# Exhibit 61

## INS Reply,
## *INS v. AT&T Corp.*, No. 14-3439
## (D.N.J. Oct. 10, 2014)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

| | | |
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| IOWA NETWORK SERVICES, INC. | : | |
| Plaintiff, | : | HON. JOEL A. PISANO |
| v. | : | Civil Action No. 3:14-cv-03439-JAP-LHG |
| AT&T CORP., | : | Motion Day: October 20, 2014 |
| Defendant. | : | |

# INS' REPLY TO AT&T'S OPPOSITION TO MOTION TO DISMISS COUNTERCLAIMS

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ATTORNEYS FOR PLAINTIFF IOWA NETWORK SERVICES, INC.

October 10, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

## FEDERAL CASES



## FEDERAL STATUTES

## FEDERAL AGENCY RULES



## FEDERAL AGENCY DECISIONS

## FEDERAL RULES OF CIVIL PROCEDURE



## FEDERAL TARIFFS



## STATE CASES



## STATE STATUTES

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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|---|---|
| IOWA NETWORK SERVICES, INC., Plaintiff, v. AT&T CORP., Defendant. | HON. JOEL A. PISANO<br>Civil Action No. 3:14-cv-03439-JAP-LHG<br>**INS' REPLY TO AT&T'S OPPOSITION TO MOTION TO DISMISS COUNTERCLAIMS**<br>Motion Day: October 20, 2014 |

Plaintiff, Iowa Network Services, Inc. ("INS"), respectfully submits this reply to Defendant AT&T Corp.'s ("AT&T") opposition to INS' motion to dismiss AT&T's counterclaims under Fed. R. Civ. P. 12(b)(6).

## I. The Federal Regulatory Regime for CEA Service Applies To All LECs, Including Competitive LECs.

This Reply will first address counts IV and VI of AT&T's counterclaims. While AT&T's other claims attack the current tariff rate for Centralized Equal Access ("CEA") service, counts IV and VI challenge the Federal Communications Commission ("FCC") regulatory regime upon which the very existence and future of CEA service depends. These AT&T counts allege that INS has violated federal law by "forcing" AT&T to interconnect with the CEA network.[1] Given AT&T's far greater market power and financial resources, it is implausible that INS could "force" AT&T to do anything. It is the FCC's regulatory framework for CEA service which has "forced" AT&T to interconnect with the CEA network when a local

[1] AT&T Opposition at 22, 27.

exchange carrier ("LEC") chooses to enter into a CEA participation agreement with INS, rather than route the LEC's calls over a direct connection or another provider's network.

Counts IV and VI should be dismissed because they ask this Court to outlaw the interconnection arrangements and participation agreements prescribed by the FCC that are fundamental to the long-standing federal regulatory scheme for CEA service. The terms of that regulatory regime have been codified in a federal tariff currently effective and made lawful by 47 U.S.C. § 204(a)(3). It is axiomatic that the actions that INS has taken to comply with those FCC regulations and its FCC tariff do not establish a viable basis for a violation of federal law. Furthermore, the Hobbs Act, 28 U.S.C. § 2342(1), precludes this Court from invalidating or modifying the CEA federal regulatory framework adopted by the FCC.

The regulatory framework the FCC established for CEA service remains consistent and compliant with the Communications Act, as amended by the Telecommunications Act of 1996 ("96 Telecom Act"). 47 U.S.C. § 201(a), which requires AT&T's network to physically interconnect with the CEA network, was not modified by the 96 Telecom Act. The FCC established the regulatory framework for CEA service pursuant to 47 U.S.C. § 214, which also was not modified by the 96 Telecom Act. That regulatory regime requires AT&T to interconnect with the CEA network for only those calls for which a LEC, such as Great Lakes Communication Corporation ("Great Lakes"), has entered into a CEA participation agreement with INS.[2] As AT&T notes, when a LEC does <u>not</u> enter into such a CEA

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[2] For a more detailed discussion of the FCC's regulatory framework for CEA service, *see* INS' Brief In Support Of Its Motion to Dismiss Counterclaims Under Rule 12(b)(6) at 7-13 ("INS' Initial Brief").

participation agreement, then the LEC's calls may be routed over another provider's network rather than the CEA network.[3]

After a LEC enters into a CEA participation agreement, the LEC's name is added to section 9 of the CEA tariff, the LEC's traffic is homed upon the CEA network, and AT&T is required by sections 6.7.7 and 8 of the CEA tariff to interconnect with the CEA network for that LEC's calls.[4] These tariff terms were made lawful when the 96 Telecom Act added section 204(a)(3) to the Communications Act. 47 U.S.C. § 204(a)(3). Upon the addition of Great Lakes' name to the CEA tariff on May 27, 2006, that lawful tariff required AT&T to interconnect with the CEA network for Great Lakes' calls. INAD Tariff F.C.C. No. 1, § 9.1, 2nd rev. p. 151.

The greater competition with AT&T from smaller carriers and new market entrants made possible by CEA service is also consistent with the pro-competitive goals of the 96 Telecom Act. CEA service was designed to benefit new competitors and smaller carriers that lacked facilities connecting to all the LECs serving rural areas. The purpose of the CEA network is not to benefit AT&T, but to enable smaller carriers and new market entrants to compete with AT&T in small towns and rural areas. Competing with AT&T in rural areas is uneconomical if new competitive service providers are required to construct their own facilities to each rural exchange. By concentrating rural traffic at INS' access tandem switches, CEA service reduces the costs for AT&T's competitors.

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3 AT&T Opposition at 25.

4 For a more detailed discussion of these CEA tariff sections, *see* INS' Initial Brief at 9-10.

At the time the FCC approved the construction of the CEA network, the FCC recognized that CEA service would increase AT&T's costs because AT&T, as the incumbent monopoly provider, already had connections to all LECs and did not have any need for CEA service. INS' Initial Brief at 16. However, given AT&T's control over most of the long distance traffic, the FCC determined that a CEA network would not be viable if it carried only the traffic of new market entrants and, therefore, required AT&T to interconnect with the CEA network. *Id.* AT&T's current displeasure with the additional costs that AT&T incurs to connect with the CEA network is not a new development and does not provide a basis for a viable claim for violation of federal law.

AT&T's counts IV and VI are grounded upon an overly narrow and restrictive interpretation of INS' section 214 certification for CEA service granted by the FCC. AT&T argues that INS' section 214 certification does not permit INS to provide CEA service to the rural exchanges of competitive local exchange carriers ("competitive LECs").[5] However, the FCC has never imposed such a limitation on the provision of CEA service.

Instead, the FCC granted INS broad section 214 authority to provide CEA service to further "the important Commission goal of making available more competitive, varied, high quality interstate services."[6] In affirming approval of the CEA network, the courts recognized that the benefits of CEA service would not be limited to long distance service. *Northwestern Bell Tel. Co. v. Iowa Utilities Board*,

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[5] AT&T Opposition at 24-25.

[6] *Application of Iowa Network Access Division for Authority Pursuant to Section 214 of the Communications Act of 1934 and Section 63.01of the Commission's Rules and Regulations*, 3 FCC Rcd 1468, 1474 ¶ 38 (1988) ("*FCC 214 Order*"), *aff'd on recon.*, 4 FCC Rcd 2201 (1989).

477 N.W.2d 678, 681 (Iowa 1991) (noting that "the network will also offer 'modern information systems'"). INS has been providing CEA service to the exchanges of competitive LECs for several years. Today, a wide variety of service providers other than incumbent LECs connect to the CEA network, including competitive LECs, wireless carriers, and Internet service providers. Furthermore, the 96 Telecom Act added 47 U.S.C. § 251(a)(1), which affirmed the right of any LEC, both competitive LECs and incumbent LECs, to choose to either interconnect indirectly with AT&T via the CEA network or to directly connect with AT&T. FCC rule 69.112(i), which states that direct connections "are not required" when CEA service is provided, also applies to all types of LECs connected to the CEA network. 47 C.F.R. § 69.112(i). Clearly, the FCC's regulatory framework for CEA service applies to calls routed to all types of LECs, both competitive and incumbent, that <u>choose</u> to connect with the CEA network.

When, as here, federal regulations and tariffs require INS to provide CEA service when Great Lakes chooses to enter into a CEA participation agreement, INS cannot be held liable for either providing CEA service for Great Lakes' calls or having a CEA participation agreement with Great Lakes. Furthermore, in providing CEA service for such a LEC's calls, INS does not become responsible for the acts or omissions of that LEC. The FCC has made it clear that INS is not liable, but remains obligated to provide CEA service, even though a LEC connected to the CEA network may act improperly. In the *Alpine* case, the FCC did not hold INS responsible for the improper conduct of LECs connected to the CEA network, but instead held that INS is "required to provide" CEA service.[7] Counts IV and VI do not state valid claims and should be dismissed because they seek a judgment in this

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[7] *AT&T Corp. v. Alpine Communications, LLC*, 27 FCC Rcd 11511¶ 1 (2012).

case, in violation of the Hobbs Act, finding that INS violated federal law by acting in accord with the FCC regulatory regime for CEA service.

## II. The CEA Tariffs Remain Lawful Because The FCC Has Never Imposed Mandatory Detariffing Upon Those Tariffs As A Retroactive Punishment.

The remaining AT&T counterclaims, counts I, II, III, and V, are barred as a matter of law by 47 U.S.C. §§ 203(c) and 204(a)(3), Neb. Rev. Stat. § 75-126 (1)(e), and Iowa Code § 476.5 because those counterclaims seek to pay a rate that is less than the currently effective and lawful CEA tariff rates. AT&T's counterclaims seek the retroactive refund of lawful tariff rates and, therefore, necessarily fail to state valid claims. The FCC Commissioners expressly rejected the interpretation and application of section 204(a)(3) that AT&T now asks this Court to adopt.

During the FCC rulemaking that implemented section 204(a)(3), AT&T asked the FCC to prevent a tariff from becoming effective and deemed lawful by automatically voiding the tariff (without further direction from the FCC) if the "tariff filing is facially inconsistent with any existing rule or regulation…such as out-of-band price cap filings."[8] AT&T similarly asks this Court to find that INS' tariffs automatically became void because they are allegedly inconsistent with the FCC's USF/ICC Order's[9] rate caps (which are nearly identical to price caps).[10] In rejecting AT&T's theory, the FCC Commissioners held that "Such presumptions would be

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[8] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2200 ¶ 60 and n.160 (1997) ("*FCC's Section 204(a)(3) Order*").

[9] *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*FCC's USF/ICC Order*").

[10] AT&T's Answer at ¶ 125; AT&T Opposition at 11.

inconsistent with the legislative intent of this provision."[11] The FCC also found that a section 204(a)(3) tariff "becomes both effective and 'deemed lawful' 7 or 15 days after the date on which it is filed."[12] Consistent with this FCC order, the Court should reject AT&T's suggestion that the CEA tariffs are void and find that the federal CEA tariff became effective and lawful 15 days after the date on which it was filed with the FCC.

The cases and FCC staff attorney's brief upon which AT&T relies also do not support voiding section 204(a)(3) lawful CEA tariffs. Neither *Global NAPS, Inc. v. FCC*, 247 F.3d 252 (D.C. Cir. 2001)[13] nor *Security Servs., Inc. v. K Mart Corp.*, 511 U.S. 431 (1994) involved tariffs made lawful by section 204(a)(3). Furthermore, *Security Servs., Inc. v. K Mart Corp*. has been narrowly construed by the 3rd Circuit to apply only when an agency has adopted a regulation expressly stating that a tariff is automatically void if it is inconsistent with a regulation. *McCray v. Fidelity Nat'l Title Ins. Co*., 682 F.3d 229, 240 (3rd Cir. 2012), *citing Norwest Transp, Inc. v. Horn's Poultry, Inc*., 37 F.3d 1237, 1239 (7th Cir. 1994) (allowing collection of the tariff rates because "there is no Commission regulation providing that a tariff is void"). This is exactly the kind of void-upon-filing regulation that the FCC rejected in the *FCC's Section 204(a)(3) Order*. AT&T's cite to *GS Texas Ventures, LLC*, DA 14-1294, 2014 FCC LEXIS 3233 ¶ 2 (2014) is also inapposite because the FCC rejected the tariff in that case during the 15 day section 204(a)(3) review period

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11 *FCC's Section 204(a)(3) Order*, 12 FCC Rcd at 2200 ¶ 61.

12 *Id.* at 2183 ¶ 22.

13 According to the FCC decision that was the subject of that appeal, the Global NAPs tariff was filed on one day's notice, not the 15 days' notice required to be deemed lawful. *Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc*., 15 FCC Rcd 12946, 12951 ¶ 11 (1999).

between the tariff filing date and proposed effective date, preventing the tariff from becoming effective or deemed lawful. In contrast, during the 15 days after the date INS filed its section 204(a)(3) tariff, the FCC did not take any action and allowed the CEA tariff to become both effective and lawful.

AT&T's reliance upon *PaeTec Communications, Inc. v. Commpartners, LLC*, Civ. Action No. 08-039, 2010 U.S. Dist. LEXIS 51926 (D.D.C. 2010) also does not support AT&T's counterclaims. That case held that a telecommunications tariff cannot apply to a service that is not a telecommunications service, such as originating VoIP. That decision is consistent with *Ambassador, Inc. v. U.S.*, 325 U.S. 317, 323 (1945), where the Supreme Court held that a telecommunications tariff cannot apply to the hotel business. By contrast, it is undisputed that CEA service is a telecommunications service and that the CEA service that INS provided to AT&T is governed by the CEA tariffs.

For several reasons, the FCC staff attorney's brief, upon which AT&T relies so heavily, is not entitled to deference and has little relevance to this case. First, unlike the *FCC's Section 204(a)(3) Order*, a brief written by attorneys employed by the FCC is not an FCC order and lacks the force of law. *Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003). Second, deference should not be given to such a brief's interpretation of a statutory provision that is unambiguous. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). The FCC itself concluded that section 204(a)(3) was clear and not ambiguous. *FCC's Section 204(a)(3) Order*, 12 FCC Rcd at 2182 ¶ 19. Third, the FCC's brief limited its analysis to an FCC regulatory regime, not applicable to this case, that expressly imposed mandatory detariffing. While AT&T selectively quotes from the brief so as to avoid mentioning the term "mandatory detariffing,"[14] the FCC's brief clearly states that "a CLEC tariff for interstate switched access services that includes rates in excess of the benchmark in Rule 61.26 is subject to mandatory detariffing." Brief For Amicus Curia FCC at 25. The FCC's brief did not address whether the FCC could void a lawful tariff in the absence of an express mandatory detariffing regulation, as AT&T seeks in its counterclaims. Therefore, the FCC's brief provides no guidance relevant to this case.

The FCC did not exercise its forbearance authority to adopt mandatory detariffing in the *FCC's USF/ICC Order*, and there is no FCC regulation that expressly imposes mandatory detariffing upon lawful CEA tariff rates as a retroactive punishment. Instead, when AT&T requested that the FCC extend mandatory detariffing, the *FCC's USF/ICC Order* clearly held: "we reject the suggestion that we detariff." *FCC's USF/ICC Order*, 26 FCC Rcd at 17887 ¶ 692 and n.1167. Therefore, CEA tariff rates should be treated as lawful, as Congress intended when it enacted section 204(a)(3), and AT&T's counterclaims seeking to void those lawful tariffs should be dismissed.

## III. FCC Rule 51.905(c) Did Not Require Reductions To The CEA Tariff Rates Because CEA Service Is Not Subject To The Rate Caps For Either Rate-of-Return Carriers Or Competitive LECs.

The Court does not need to reach the issue of whether the rate regulations adopted in the *FCC's USF/ICC Order* apply to CEA service. Regardless of how those rules are interpreted, section 204(a)(3) requires AT&T's payment of the lawful CEA tariff rates so long as they remain effective. However, to be thorough, INS will briefly address that issue.

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14 AT&T Opposition at 9.

AT&T's conclusory allegation that the *FCC's USF/ICC Order* required tariff rate reductions for all switched access services is simply wrong.[15] The *FCC's USF/ICC Order* adopted 47 C.F.R. § 51.905(c), which states: "Nothing in this section shall be construed to require a carrier to file or maintain a tariff or to amend an existing tariff if it is not otherwise required to do so under applicable law." CEA service is one of the services for which revised tariff rates were not required by the *FCC's USF/ICC Order*.

INS is not a "Rate-of-Return Carrier" subject to the rate regulations in 47 C.F.R. § 51.909, which only applies to the specifically defined, capitalized term "Rate-of-Return Carrier." When quoting this rule to the Court, AT&T goes so far as to put this defined term in lower case in an effort to avoid its legal force. AT&T Opposition at n. 7. However, it is undisputed that the defined term "Rate-of-Return Carrier" is limited to incumbent LECs. 47 C.F.R. § 51.903(g) (defining "Rate-of-Return Carrier"). It is also undisputed that INS is not an incumbent LEC as defined by 47 U.S.C. § 251(h), which defines an incumbent LEC as a carrier that provides local service and is a National Exchange Carrier Association ("NECA") member. INS is not a "Rate-of-Return Carrier" within the narrow scope of the section 51.909 rate regulations because it does not satisfy either prong of the definition of an incumbent LEC.

AT&T also mistakenly alleges that INS is a competitive LEC if it is not an incumbent LEC.[16] The rate regulations for competitive LECs set forth in 47 C.F.R. § 51.911 must be applied so as to avoid both a conflict with FCC regulations applicable to CEA service and an irrational result. Regulating INS as a competitive

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15 AT&T's Answer at ¶ 51; AT&T Opposition at 15-17.

16 AT&T's Answer at ¶ 115; AT&T Opposition at 16.

LEC would directly conflict with the *FCC 214 Order*, which, since INS' inception, has regulated INS' tariff rates as those of a dominant carrier. *FCC 214 Order*, 3 FCC Rcd. at 1469 ¶ 10. A competitive LEC is a non-dominant carrier. It is undisputed that INS is not a non-dominant carrier. It would be irrational to construe the *FCC's USF/ICC Order* as regulating INS as a competitive LEC when INS has never been so regulated.

Throughout the *FCC's USF/ICC Order*, the FCC limits rate caps for competitive LECs to carriers that benchmark their rates.[17] "Application of our access reform will generally apply to competitive LECs via the CLEC benchmarking rule."[18] Competitive LECs are required to benchmark their access service rates at the rates charged by the incumbent LEC with which they compete in the provision of local service. CEA service does not involve local service and CEA tariff rates have never been benchmarked against any incumbent LEC's rates. Instead of rate benchmarking, it is undisputed that the FCC has always required INS to submit cost studies to justify the CEA tariff rates in accordance with the dominant carrier rate regulatory regime in 47 C.F.R. § 61.38.

Neither CEA service nor INS are mentioned in any of the 1,430 paragraphs of the *FCC's USF/ICC Order*. Clearly, the *FCC's USF/ICC Order* did not consider any evidence related to the costs of CEA service or the financial impact of reducing the CEA tariff rates. At a minimum, the FCC was required to consider the financial impact on INS if the *FCC's USF/ICC Order* was intended to reduce the CEA tariff rates. *Jersey Central Power & Light Co. v. Fed.l Energy Reg. Comm'n.,* 810 F.2d 1168, 1176-77 (D.C. Cir. 1987), *quoting FPC v. Hope Natural Gas Co*., 320 U.S.

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17 *See e.g., FCC's USF/ICC Order* at ¶¶ 801, 807, 866.

18 *Id.* at ¶ 807.

591, 603 (1944). As INS is not a Rate-of-Return Carrier or competitive LEC as defined by the *FCC's USF/ICC Order*, the rate regulations adopted for those types of LECs do not apply to CEA service and INS is permitted by 47 C.F.R. § 51.905(c) to revise the CEA tariff rates as it did.

## IV. Relying Solely Upon Baseless Speculation That There May Be An Access Revenue Sharing Agreement, AT&T's Access Stimulation Counterclaim Fails The Pleading Standard For A Plausible Claim In Federal Court.

Because the currently effective CEA tariff rates are the lawful rates that must be paid for CEA service, it is also unnecessary for the Court to reach the issue of whether the FCC's access stimulation rules apply to INS. Therefore, INS will only briefly address this issue.

The FCC's definition of "access stimulation" requires (1) a net payment from INS to Great Lakes and (2) an access revenue sharing agreement between INS and Great Lakes. 47 C.F.R. § 61.3(bbb). The FCC did not classify every contract as an access revenue sharing agreement. Instead, the FCC imposed the net payment requirement as a bright line test defining the scope of contracts that qualify as access revenue sharing agreements. *FCC's USF/ICC Order*, 26 FCC Rcd at 17878 ¶ 670. While INS has a CEA participation agreement with Great Lakes, as required by the *FCC 214 Order*, that contract does not involve any payments to Great Lakes, and INS has never made any such payments to Great Lakes.

AT&T's access stimulation allegation is based on baseless speculation, and does not satisfy the pleading requirements necessary to state a plausible claim in federal court. AT&T's counterclaims do not include any factual assertion that INS has made any payment to Great Lakes or that there even exists an access revenue sharing agreement with INS. "Without some factual allegation in the complaint, it is hard to see how a complainant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

In lieu of pleading any facts regarding a net payment or access revenue sharing agreement,[19] AT&T argues that an FCC pleading standard, which has no application in federal court, allows AT&T to simply assert that there is a 3:1 traffic ratio.[20] Allegations that could equally be explained as "natural, unilateral" actions "prompted by lawful, independent goals" do not state a plausible claim that there is an agreement or conspiracy. *Twombly* at 566-567. Rather than suggest the existence of an access revenue sharing agreement, the 3:1 traffic ratio alleged by AT&T is the result of INS' unilateral actions. The 3:1 ratio resulted from INS' independent commercial efforts and INS' expectation that AT&T would compensate INS for the CEA service that AT&T purchased. When AT&T sent traffic to INS' network that resulted in the 3:1 ratio, INS independently, and as required by FCC regulations, provided CEA service that routed the traffic to Great Lakes' network.

For the same reasons the conspiracy or agreement was not plausible in *Twombly*, it is not plausible in this case. AT&T's counterclaims contain only descriptions of independent conduct by INS and Great Lakes rather than assert any actual access revenue sharing agreement. *Twombly*, 550 U.S. at 564. AT&T's counterclaims do not contain any facts "pointing towards a meeting of the minds." *Id*. at 557. Such facts should identify which of INS' employees supposedly agreed and the specific time and place where the alleged access revenue sharing agreement and payments by INS took place. *Id*. at 565. Facts alleging conduct "merely consistent with agreement" or "an account of a defendant's commercial efforts" do

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19 AT&T Counterclaims at ¶ 91.

20 AT&T Opposition at 21.

not satisfy Rule 8(a)(2)'s pleading requirements. *Id.* As an access revenue sharing agreement is not suggested by the facts alleged by AT&T, the counterclaims should be dismissed for failing to state a valid federal law claim against INS for access stimulation.

## V. The Court Should Also Dismiss The Declaratory Judgment Claims.

Because AT&T's substantive claims lack merit, this Court should also dismiss AT&T's declaratory judgment claims in counts V and VI. The Declaratory Judgment Act is procedural only and is not an independent basis for establishing subject matter jurisdiction. *Interfaith Community Organization v. Honeywell International, Inc.*, 263 F. Supp. 2d 796, 871 (D.N.J. 2003); *Lewis v. Allegheny Ludlum Corp*., 2013 U.S. Dist. 109999 *67 (W.D. Pa. 2013).

## VI. 47 U.S.C. § 207 Precludes AT&T From Filing Its Counterclaims With The FCC.

AT&T suggests that at some unspecified time in the future, it may file with the FCC, pursuant to the doctrine of primary jurisdiction, the same claims it has filed with this Court.[21] However, 47 U.S.C. § 207 provides AT&T the choice of filing its claims either with a court or the FCC, but prohibits AT&T from filing its claims in both forums. Section 207 expressly states that "such person shall not have the right to pursue both such remedies." "By the terms of § 207, the choice to proceed in one or the other available forum destroys jurisdiction in the remaining body." *Bell Atlantic Corp. v. MFS Communications Co.*, 901 F. Supp. 835, 853 (D. Del. 1995); *see also, Premiere Network Services, Inc. v. SBC Communications, Inc.*, 440 F.3d 683, 688 (5th Cir. 2006). Because AT&T did not file its claims with the FCC before

[21] AT&T Opposition at n.25, 29.

filing its answer with this Court (as CenturyLink did), the FCC lacks jurisdiction to decide the same AT&T claims that AT&T asserts here.

## VII. Conclusion

For the foregoing reasons, INS' motion should be granted and AT&T's counterclaims should be dismissed.

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ATTORNEYS FOR PLAINTIFF IOWA NETWORK SERVICES, INC.

October 10, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

| | | |
|---|---|---|
| IOWA NETWORK SERVICES, INC. | : | |
| Plaintiff, | : | HON. JOEL A. PISANO |
| v. | : | Civil Action No. 3:14-cv-03439-JAP-LHG |
| AT&T CORP., | : | |
| Defendant. | : | **CERTIFICATE OF SERVICE** |

I, Robert Levy, hereby certify that on October 10, 2014, I electronically filed the foregoing INS' Reply to AT&T'S Opposition to Motion to Dismiss Counterclaims in the above-captioned matter using CM/ECF systems, which sent notification of such filing to:

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# Exhibit 62

## Comments of the Equal Access Service Providers, *In re High-Cost Universal Serv.ice Support, et al.*, WC Docket No. 05-337 (filed Nov. 26, 2008)

**PUBLIC VERSION**

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| High-Cost Universal Service Support | ) | WC Docket No. 05-337 |
| Federal-State Joint Board on Universal Service | ) | CC Docket No. 96-45 |
| Lifeline and Link Up | ) | WC Docket No. 03-109 |
| Universal Service Contribution Methodology | ) | WC Docket No. 06-122 |
| Numbering Resource Optimization | ) | CC Docket No. 99-200 |
| Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |
| Developing a Unified Intercarrier Compensation Regime | ) | CC Docket No. 01-92 |
| Intercarrier Compensation for ISP-Bound Traffic | ) | CC Docket No. 99-68 |
| IP-Enabled Services | ) | WC Docket No. 04-36 |

**COMMENTS OF THE EQUAL ACCESS SERVICE PROVIDERS**

Iowa Network Service, Inc. ("INS"), Onvoy, Inc. ("Onvoy"), and South Dakota Network, LLC ("SDN") hereby submit comments in the above-referenced dockets regarding the comprehensive reform of intercarrier compensation. INS, Onvoy, and SDN are Centralized Equal Access (CEA) providers in the states of Iowa, Minnesota, and South Dakota, respectively. The CEA providers' core business and business purpose is the provision of equal access to rural incumbent local exchange carriers ("rural ILECs") on a centralized basis. As such, the networks are highly dependent on the existing tandem access charge structure for interstate and intrastate operations. All three CEA providers' centralized equal access service rates are closely regulated by their respective state commissions as well as the FCC. As a result, if the Commission's proposed orders, which entail the dramatic reduction of interstate and intrastate access charges, are applied to CEA providers, this could impact these CEA providers and/or the rural ILECs they serve.

Owing to the difficult economics of serving rural areas and the need for affordable equal access by interexchange carriers, the CEA providers were authorized by the FCC and their state commissions to construct and operate statewide fiber networks and equal access tandems. The CEA networks act as a hub, concentrating demand in rural markets and providing equal access functionality to subtending rural ILECs on a centralized basis. These services, the historical background of the centralized networks, and the detailed metrics about them are more fully described in filings earlier made in this proceeding.[1] The views articulated in 2005 in the CEA providers' comments are no less relevant here.

The Chairman's Draft Proposal[2] and the Alternative Proposal[3] both propose to drastically reduce intra- and interstate access rates. Although it is not at all clear that the proposals apply to the CEA providers, the CEA providers pointed out in previous comments that any access reduction could have detrimental consequences for the ILECs served by the CEA networks and therefore, the CEA networks. Intrastate and interstate access rates are the only source of revenue for the CEA service. The CEA providers do not have end-users, and hence collect no Subscriber Line Charges; nor do they have access to the Universal Service Fund, as the CEA providers do not fall within the statutory definition of a local exchange carrier.

Consequently the current intercarrier compensation reform proposals do not appear to apply to the CEA providers, nor should they, given the unique public interest factors that underlie the construction and continued operation of these networks. The CEA providers are regulated on a rate-of-return basis and their earnings are closely monitored in earnings reports filed with the Commission. The Commission is accordingly urged to refrain from applying the

[1] The CEA providers filed Comments of the Equal Access Providers, Docket 01-92 (filed May 23, 2005), Reply Comments of the Equal Access Service Providers, Docket 01-92 (filed February 1, 2007), Ex Parte Presentation by Iowa Network Services, Inc., Onvoy, Inc., and South Dakota Network, LLC, Docket 01-92 (filed May 12, 2005). In those filings, the three networks expressed concern over the earlier proposals that would have reduced access rates less than proposed in this proceeding. The basic facts presented to the Commission about the operating characteristics of the networks have changed little.

[2] *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services,* CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92, WC Docket Nos. 03-109, 04-36, 05-337, 06-112, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, November 5, 2008, at Appendix A

[3] Id. at Appendix C

current proposals to the CEA providers, and to continue to support the efficiency and technology these companies provide to rural customers.

Respectfully submitted,

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Iowa Network Services, Inc.

/s/ Fritz Hendricks
Fritz Hendricks
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Dated: November 26, 2008

# Exhibit 63

## Brief for Amicus Curiae FCC, *Paetec Comm'cns, Inc. v. MCI Comm'cns Servs., Inc.* (3d Cir. Mar. 14, 2012)

BRIEF FOR AMICUS CURIAE FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 11-2268 (consolidated with 11-2568) & 11-1204 (consolidated with 11-2569)

PAETEC COMMUNICATIONS, INC. ET AL.,

PLAINTIFFS – COUNTERCLAIM DEFENDANTS - APPELLEES – CROSS-APPELLANTS,

v.

MCI COMMUNICATIONS SERVICES, INC. D/B/A VERIZON BUSINESS SERVICES;
VERIZON GLOBAL NETWORKS INC.,

DEFENDANTS – COUNTERCLAIM PLAINTIFFS – APPELLANTS – CROSS-APPELLEES.

On Appeal and Interlocutory Review Under 28 U.S.C. § 1292(b) from the United States District Court for the Eastern District of Pennsylvania, No. 09-cv-1639 (SD)

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# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### ADMINISTRATIVE DECISIONS

**STATUTES AND REGULATIONS**

**OTHERS**

At this Court's invitation, the Federal Communications Commission ("FCC" or "Commission") respectfully files this brief as amicus curiae.

## STATEMENT OF INTEREST

The FCC has primary responsibility for implementing and enforcing the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* ("the Act"). The FCC has an interest in ensuring that the Act, its implementing rules, and its precedents are correctly interpreted.

## QUESTIONS PRESENTED

This Court, pursuant to its Order dated January 25, 2012, invited the FCC to set forth its position on four questions:

1. Is a [CLEC] authorized under the regulations codified at 47 C.F.R. § 61.26 *et seq.*, and the FCC's rulings in the *Eighth Report and Order*, 19 FCC Rcd. 9108 (2004), to include a tandem-switch fee in the composite switched access rate it charges to long-distance carriers for calls to and from the CLEC's end-users in either of the following situations: (a) when the CLEC provides an indirect connection to its end-office switch, and subtends a third party tandem switch?; or [(b)] when the CLEC provides a direct connection to its end-office switch? In neither situation does the CLEC directly operate a tandem switch.

   Answer: As explained in Argument Section I below, the FCC believes the answer to both parts of the question is no.

2. Whether a tariff intended to be filed on a "streamlined basis" pursuant to 47 U.S.C. § 204(a)(3), but received by the FCC 14 days before the "effective date" printed on the tariff, can be "deemed lawful" (*e.g.,* by tolling the "effective date" one day forward to provide a 15 day notice period)?

   Answer: As explained in Argument Section II below, the FCC believes the answer is no.

3. Whether a CLEC's switched access tariff, filed on a "streamlined" basis pursuant to 47 U.S.C. § 204(a)(3) but subsequently found to violate the FCC's benchmark, can enjoy "deemed lawful" status? Or, is that tariff subject to the mandatory detariffing rule announced in the *Seventh Report and Order*, 16 FCC Rcd. 9923 (2001)?

   Answer: As explained in Argument Section III below, the FCC believes the answer is no to the first question, and yes to the second question.

4. Whether a CLEC is subject to overcharge liability despite charging the rates specified in its "deemed lawful" tariff schedule, when those rates are subsequently found to violate the FCC's benchmark and the tariff contains a provision stating that "notwithstanding any other provision … the rate for Switched Access Service shall equal the maximum rate permitted under 47 C.F.R. § 61.26"?

   Answer: As explained in Argument Section IV below, the FCC believes a CLEC could be subject to overcharge liability under 47 U.S.C. § 203(c) of the Act if the CLEC violates the terms of its tariff.

## STATEMENT OF THE CASE

### I. STATUTORY AND REGULATORY BACKGROUND

1. The Act directs the FCC to ensure that rates for telecommunications services are "just and reasonable," 47 U.S.C. § 201(b), and not unjustly or unreasonably discriminatory. 47 U.S.C. § 202(a). In certain circumstances, a carrier is required to file "schedules of charges" (*i.e.*, "tariffs") with the FCC setting forth the rates (as well as other terms and conditions) upon which it will provide service to customers. 47 U.S.C. § 203(a). When a carrier files a tariff, it may charge only the rate specified in that tariff. *Id.* § 203(c). The

Act, moreover, provides the FCC various tools to ensure that tariffed rates are just and reasonable, as required by section 201(b) of the Act.[1]

Courts have drawn a distinction between "legal" and "lawful" tariffs. "A *legal* tariff is procedurally valid – it has been filed with the Commission, the Commission has allowed it to take effect, and it contains the published rates the carrier is permitted to charge." *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006) ("*Vitelco*") (internal quotations and citations omitted). "A *lawful* tariff," by contrast, "is a tariff that is not only legal, but also contains rates that are 'just and reasonable' within the meaning of § 201(b)." *Id.* (emphasis added).

A legal tariff can become substantively lawful if it is so adjudged in a hearing before the FCC, *see* 47 U.S.C. § 204(a)(1), or it can be "deemed lawful" if it is filed pursuant to a "streamlined" procedure specified in 47 U.S.C. § 204(a)(3). Under that provision, a tariff filed on a streamlined basis "shall be deemed lawful and shall be effective 7 days [for a rate decrease] and

[1] *See, e.g.*, 47 U.S.C. § 205 (the FCC may prescribe a just and reasonable rate "to be thereafter observed" if it determines after a hearing that a carrier's tariffed rate is unlawful); 47 U.S.C. § 208 (the FCC must investigate claims about the lawfulness of rates set forth in effective tariffs); 47 U.S.C. § 206 (the FCC may award damages to a complainant if it finds that a carrier's tariffed rates are unlawful); 47 U.S.C. § 204(a)(1) (the FCC may suspend a new or revised tariff before it becomes effective).

15 days [for a rate increase] after the date on which it is filed with the Commission unless the Commission takes action … before the end of that 7-day or 15-day period."

"A carrier charging a merely *legal* rate may be subject to refund liability if customers can later show that the rate was unreasonable." *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002); *see also Vitelco,* 444 F.3d at 669. "A carrier charging rates under a lawful tariff, however, is immunized from refund liability, even if that tariff is found unlawful in a later complaint [under 47 U.S.C. § 208] or rate prescription proceeding [under 47 U.S.C. § 205]." *Vitelco*, 444 F.3d at 669.

In certain circumstances, the Commission has exercised its authority under 47 U.S.C. § 160 to forbear from applying the tariff provisions in the Act (including, but not limited to, § 204) and the FCC's implementing regulations. *See, e.g., Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* 16 FCC Rcd 9923, 9956-58 (¶¶ 82-87) (2001) ("*Seventh Report and Order*"); *Petitions of AT&T, Inc. and BellSouth Corp. for Forbearance*, 22 FCC Rcd 18705, 18729 (¶ 42) (2007) ("*AT&T Forbearance Order*"). One exercise of the Commission's forbearance authority has involved a procedure known as "mandatory detariffing." Under that procedure, carriers are *prohibited* from filing tariffs with the FCC. Instead, they must negotiate rates with their customers without resort to section 203 of the Act and the FCC's rules governing tariffs.[2]

2. This case involves interstate switched "access service" – the service that local telephone companies ("local exchange carriers" or "LECs") provide to connect their end-user subscribers with interexchange carriers ("IXCs") when such subscribers make or receive long-distance calls. The FCC's rules generally require LECs to file tariffs with the Commission that establish the rates, terms, and conditions for their interstate access services, subject to certain exceptions. *See, e.g.*, 47 C.F.R. § 69.1(b).

a. "Historically," the "access charges" levied by incumbent local exchange carriers ("ILECs") "have been the product of an extensive regulatory process." *Seventh Report and Order*, 16 FCC Rcd at 9939 (¶ 41). "This process," the FCC has found, "yield[s] presumptively just and reasonable rates." *Id.* Competing LECS ("CLECs"), by contrast, were "largely unregulated in the manner in which they set their access rates" until 2001, when the FCC adopted the *Seventh Report and Order*. *Id.* at 9931

[2] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730 (1996), *recon.*, Order on Reconsideration, 12 FCC Rcd 15014 (1997), *further recon.*, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999), *aff'd, MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000).

(¶ 21). In that *Order*, the FCC "limit[ed] the application of [its] tariff rules to CLEC access services" after finding that some CLECs were "us[ing] the regulatory process to impose excessive access charges on IXCs and their customers." *Id.* at 9924-25 (¶ 2); *see also id.* at 9934 (¶ 27). This anticompetitive practice was possible because the market for these services did not allow competition to discipline rates and CLECs thus enjoyed a monopoly over access charges: in order to originate and terminate long distance traffic, the IXC has no choice but to use the local network of the LEC serving the end-user customer. *See id.* at 9934-36 (¶¶ 28-32).

Responding to the record evidence, the FCC expressed "concern[] that … permitting CLECs to tariff any rate they choose may allow some CLECs inappropriately to shift onto the long distance market … a substantial portion of the CLECs' start-up and network build-out costs." *Id.* at 9936 (¶ 33). That, in turn, "may promote economically inefficient entry into the local markets and may distort the long distance market." *Id.*

"[T]o eliminate regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access services," the FCC used its forbearance authority under 47 U.S.C. § 160 to impose a "detariffing regime". *Id.* at 9925 (¶ 3). "CLEC access rates that are at or below [a] benchmark … will be presumed to be just and reasonable" and "CLECs may impose them by tariff." *Id.* But "[a]bove the benchmark," the FCC held that "CLEC access services will be mandatorily detariffed." *Id.; see also id*. at 9938-40, 9956 (¶¶ 40-44, 82). Thus, under this mandatory detariffing regime, a CLEC "must negotiate higher rates with IXCs" outside the tariff process set forth in the Act and the FCC's implementing regulations. *Id.* at 9925 (¶ 3).

The FCC explained that the "benchmark rate, above which a CLEC may not tariff, should eventually be equivalent to the switched access rate of the incumbent provider operating in the CLEC's service area." *Id.* at 9941 (¶ 45); *see also* 47 C.F.R. § 61.26(c). The FCC capped CLEC switched access charge rates at those of the competing ILECs because ILEC rates are "presumptively just and reasonable." *Id.* at 9939 (¶ 41). In "moving CLEC tariffs to the 'rate of the competing ILEC,'" the FCC clarified that it "d[id] not intend to restrict CLECs to tariffing solely the per-minute rate that a particular ILEC charges for its switched, interstate access service." *Id.* at 9945 (¶ 54). "The only requirement," the FCC explained, "is that the aggregate charge for these services, however described in [CLEC] tariffs, cannot exceed our benchmark." *Id.* at 9946 (¶ 55).

In the *Seventh Report and Order*, the FCC did not immediately require CLECs to reduce their interstate access rates to the switched access rate of the competing ILEC. Instead, it imposed transitional benchmark rates that dropped from 2.5 cents per minute to 1.2 cents per minute over the course of three years. *Id.* at 9944-45 (¶ 52); *see also* 47 C.F.R. § 61.26(c). It was only at the end of the transition period, which ended on June 21, 2004, that a CLEC's tariffed interstate access rates were capped at the benchmark rate (*i.e.*, the switched access rate of the competing ILEC). *Id.*

The FCC codified these requirements at 47 C.F.R. § 61.26.

b. Three years after the *Seventh Report and Order*, in 2004, the FCC rejected a request by Qwest Communications Corporation, an IXC, to clarify that "the benchmark rate should be … reduced" when "a carrier other than the [C]LEC" provides part of the switched access services necessary to deliver a long-distance call. *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 19 FCC Rcd 9108, 9113 (¶ 10) (2004) ("*Eighth Report and Order*"). The FCC held that, so long as the CLEC was providing local telephone service to the person who received that call (the "end user"), the CLEC could tariff a rate equal to the full benchmark rate. *Id.* at 9114 (¶ 13). At the same time, the FCC rejected a request by NewSouth Communications, Inc., a CLEC, to declare "that a [C]LEC should be permitted to charge for all of the competing [I]LEC access elements (including tandem switching and end office switching) if its switch serves a geographic area comparable to the competing [I]LEC's tandem." *Id.*

at 9118 (¶ 20).[3] The FCC instead "clarif[ied] that the competing [I]LEC switching rate" used as the benchmark "is the end office switching rate when a [C]LEC originates or terminates calls to end-users and the [ILEC] tandem switching rate when a [C]LEC passes calls between two other carriers." *Id.* at 9119 (¶ 21).

c. A subsequent FCC order reiterated that a CLEC may only charge an IXC for tandem switching when it actually provides tandem switching. *See Access Charge Reform*, 23 FCC Rcd 2556, 2564 (¶ 26) (2008) ("*Clarification Order*"). In that order, the FCC clarified that the earlier *Eighth Report and Order* "does not prevent [C]LECs from charging for both tandem and end office switching when these functions are provided by separate switches." *Id.* Acknowledging its earlier holding that a CLEC may only charge an IXC a single switching rate (*i.e.*, either tandem or end office switching, whichever is applicable) when it uses one switch to provide interstate access service, the FCC found that "[w]hen a [C]LEC performs both functions, … using two separate switches, it may charge for both functions, as would an [I]LEC." *Id.*

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[3] A switch is a device used to route telephone calls to their destinations. An end-office switch is a type of switch located in a LEC central office; it serves as the network entry point for the loops, or transmission facilities, that connect a residence or business to the Public Switched Telephone Network. A tandem switch is an intermediate switch located between the end-office switch and the final destination of the call.

## II. THE PROCEEDINGS BELOW

1. PAETEC Communications, Inc. ("PAETEC") is a CLEC. Its provision of interstate switched access services to IXCs, including Verizon Business Services ("Verizon"), is governed by PAETEC Tariff No. 3 on file with the FCC. Pls. Br. 18; Defs. Br. 15. Two of those services are in dispute: (1) Switched Access Service ("SWAS"), which applies to long-distance calls that an IXC routes to PAETEC indirectly through an ILEC's tandem switch, and (2) Switched Access Service (Direct Connection) ("SWAS-DC"), which applies to long-distance calls that an IXC routes directly to PAETEC's switch. Pls. Br. 18; Defs. Br. 16-17. Since August 2, 2006, PAETEC has charged a single "composite" rate for SWAS and SWAS-DC, and as relevant to this case, those rates include a charge for tandem switching that is equivalent to the competing ILEC's rate for tandem switching. Pls. Br. 18-19; Defs. Br. 18.

2. On April 17, 2009, PAETEC filed a complaint in which it sought to collect SWAS and SWAS-DC charges that IXC Verizon had disputed and failed to pay. In ruling on cross-motions for summary judgment, the court below interpreted the FCC's rules to permit a CLEC to charge an IXC for tandem switching where the CLEC routes its calls to its own end-user customers through an ILEC tandem switch. (App. 92). Accordingly, the

district court found that PAETEC's SWAS rates complied with the benchmark rate in Rule 61.26. (App. 92). By contrast, where an IXC connects directly to a CLEC switch, the court held that a CLEC may not charge for tandem switching and, as a consequence, that PAETEC's SWAS-DC rate exceeded the benchmark rate in Rule 61.26(c). (App. 92-96).

The district court then addressed two further issues concerning PAETEC's SWAS-DC rates. First, the court found that PAETEC's SWAS-DC rates were not deemed lawful for the period beginning December 24, 2008, because PAETEC's tariff for that period provided the FCC with only 14 days' notice, not the 15 days required by 47 U.S.C. § 204(a)(3). (App. 102-105). Second, it held that PAETEC's SWAS-DC rates for the period August 2, 2006 through December 24, 2008 (App. 24) were "deemed lawful," despite the fact that the FCC's regulations "forbid[] CLECs from filing tariffs in excess of the Benchmark" in Rule 61.26(c). (App. 59-63).

## ARGUMENT

An "agency's reading of its own rule is entitled to substantial deference." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328 (2008). Indeed, an agency's construction of its own rule is "controlling" when, as in this case, the interpretation reflects a "fair and considered judgment" and is not "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S.

452, 461-62 (1997). This rule of deference applies to the FCC's interpretation of its own regulations, as set forth in an amicus brief that (like this brief) reflects the agency's fair and considered view on the question. *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S.Ct. 2254, 2261 (2011) (deferring to FCC rule interpretation contained in amicus brief).

## I. IF A CLEC DOES NOT PROVIDE TANDEM SWITCHING, IT MAY NOT CHARGE FOR TANDEM SWITCHING.

Under the rules at issue in this case, if a CLEC does not provide tandem switching functionality, the CLEC may not include a tandem-switching charge in the interstate switched access rates it levies on IXCs for calls to and from the CLEC's end-user customers. This common-sense interpretation – that a carrier may charge only for services that it actually provides – applies irrespective of how the CLEC interconnects with the IXC (*i.e.*, "directly" or "indirectly," as described in Question 1) or how it elects to bill the IXC (*i.e.*, through a composite rate or individual rate elements).

The FCC decided this issue in the *Eighth Report and Order*, where it rejected NewSouth's proposal "that a [C]LEC should be permitted to charge for all of the competing [I]LEC access elements (including tandem switching and end office switching) if its switch serves a geographic area comparable to the competing [I]LEC's tandem." *Id.* at 9118 (¶ 20). In that *Order*, the FCC explained that its "long-standing policy with respect to [I]LECs is that they should charge only for those services that they provide." *Id.* at 9118-19 (¶ 21). The FCC noted that "[u]nder this policy, if an [I]LEC switch is capable of performing both tandem and end office functions, the applicable switching rate should reflect only the function(s) actually provided to the IXC." *Id.* It then reasoned that "a similar policy should apply to [C]LECs." *Id.*

The FCC's *Clarification Order* supports this conclusion. There, the FCC considered the applicable benchmark rate where a CLEC uses both a tandem switch and an end-office switch to connect calls from IXCs to its end-user customers. Citing paragraph 21 of the *Eighth Report and Order*, the FCC reiterated that "where a single switch is capable of providing tandem and end office functions, … [C]LECs can charge the end office switching rate when they originate or terminate calls to end users, and the tandem switching rate when they pass calls between two other carriers." *Id.*, 23 FCC Rcd at 2565 (¶ 26). Yet it also emphasized that "[w]hen a [C]LEC performs both functions, … using two separate switches, it may charge for both functions, as would an [I]LEC." *Id.*[4]

[4] Verizon thus reaches the right result under the wrong theory in this case. Relying on paragraph 19 of the *Eighth Report and Order*, Verizon claims that paragraph 13 applies only to the transitional benchmark rates, whereas

Footnote continued on the next page.

The first question this Court has posed to the FCC appears to perceive some tension between paragraphs 13 and 21 of the *Eighth Report and Order*, 19 FCC Rcd at 9114, 9118-19 (¶¶ 13, 21). *See* Jan. 25, 2012 Order at 1, n.1. Properly construed, however, the two paragraphs are harmonious. In paragraph 13 of that *Order*, the FCC "den[ied] Qwest's request for clarification that the full benchmark rate is not available in situations when a [C]LEC does not provide the entire connection between the end user and the IXC." *Id.* at 9114 (¶ 13). The FCC so held in order to enable a CLEC to charge the "full benchmark rate" in Rule 61.26(c), 47 C.F.R.§ 61.26(c), in the circumstance where a CLEC and an ILEC provide the same access element (*e.g.*, tandem switching) in the call path between an IXC and the CLEC's end-user customer. Paragraph 21 is thus entirely consistent with paragraph 13 in that it also holds that a CLEC may charge an IXC for the services it actually provides – or, more specifically, a CLEC may charge for tandem switching when it provides tandem switching in addition to end-office switching to terminate an IXC's long-distance traffic with the CLEC's end-

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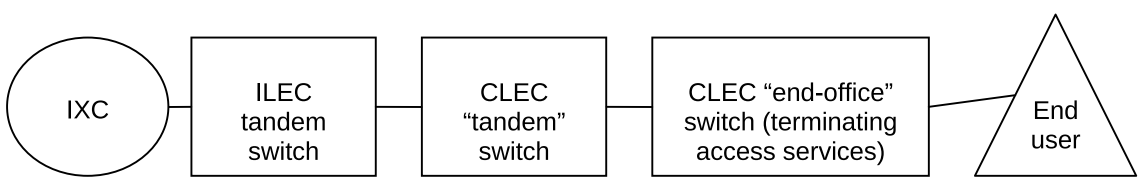
paragraph 21 of that *Order* and the subsequent *Clarification Order* apply to the final benchmark rate. Defs. Br. 41-44. The *Eighth Report and Order* does not establish such a dichotomy. Paragraph 19 explains that "the arguments presented by Qwest to support its request are equally applicable to the transitional benchmark rates" and the final benchmark rates. 19 FCC Rcd at 9117-18.

user customers. *Id.* at 9118-19 (¶ 21); *see also Clarification Order*, 23 FCC Rcd at 2564 (¶ 26).

By way of example, an IXC could send its traffic through two tandem switches to reach an end user customer served by a CLEC. As shown in the diagram below, the IXC would interconnect with an ILEC tandem switch, which would be interconnected with a CLEC's switch. A call from the IXC to the CLEC end user customer would thus pass through the ILEC's tandem switch, to the CLEC's switch, and then to a different CLEC switch before being terminated with the end user customer. In that circumstance, the CLEC is performing all of the functions encompassed by the full benchmark rate (from tandem switching to termination with the end user customer), even though there also is an ILEC performing some functions between the IXC and the CLEC.




Qwest's request for clarification effectively asked the FCC to determine that an IXC is *never* required to pay a CLEC for tandem switching where that service is provided by a different carrier, including in the scenario described above. Specifically, Qwest argued that "when one or more of the services necessary to originate or terminate an interexchange call is provided by a carrier other than a [C]LEC, … the benchmark rate should be correspondingly reduced." *Eighth Report and Order*, 19 FCC Rcd at 9113 (¶ 10). So, for example, "where the [I]LEC still provides tandem switching," Qwest asserted that "the IXC should have to pay that charge to the [I]LEC only, and not to both the [I]LEC and the [C]LEC" – even where the CLEC also provides tandem switching service with its own switch.[5] *Id.* The FCC, in paragraph 13, disagreed. "When a [C]LEC originates or terminates traffic to its own end users," the FCC explained, "it is providing the functional equivalent of those services, even if the call is routed from the [C]LEC to the IXC through an [I]LEC tandem." *Eighth Report and Order*, 19 FCC Rcd at 9114 (¶ 13). Paragraph 13 thus confirms the common-sense principle that where a CLEC provides a functionality such as tandem switching, it can charge for it, even if an ILEC also provides the same functionality in the call path between an IXC and a CLEC end-user customer.

[5] Qwest specifically argued that "if an ILEC provides (and directly bills an IXC for) tandem switching used to originate and terminate long distance calls to a CLEC's end user [customers], the ILEC's rate for tandem switching should be subtracted from the 'competing ILEC rate' used in the applicable benchmark," irrespective of whether the CLEC also provides tandem switching to complete the long-distance call. *See* Qwest Communications Corporation Petition for Clarification Or, In the Alternative, Reconsideration, CC Docket No. 96-262 at 3 (filed June 20, 2001).

Contrary to PAETEC's position, Paragraph 13 of the *Eighth Report and Order* does not support the counter-intuitive proposition that a CLEC may charge an IXC for tandem switching when it does not provide that service. *See* Pls. Br. 30. PAETEC misconstrues that paragraph when it broadly asserts that "the FCC confirmed that a CLEC can charge a composite rate based on the aggregate total of what an ILEC charges, *specifically including the ILEC's charge for the ILEC tandem switch*, even if the CLEC does not itself use a tandem switch to deliver its access service." Pls. Br. 18.[6] In so arguing, PAETEC overlooks that the FCC's holding in paragraph 13 of the *Eighth Report and Order* is qualified: "because there *may* be situations" (such as the relatively rare double-tandem scenario described above) "when a [C]LEC does not provide the entire connection between the end user and the IXC, but is nevertheless providing the functional equivalent of the [I]LEC interstate exchange access services, we deny Qwest's petition." *Id.* (emphasis

[6] Relying on rule 61.26(a)(3), as quoted in paragraph 13 of the *Eighth Report and Order*, PAETEC contends that "when CLECs deliver switched access service, the CLECs are providing the functional equivalent of all the elements – including tandem switching – that ILECs may use to provide switched access service." Pls. Br. 28. That statement is correct only insofar as the CLEC actually provides the IXC with the access service elements listed in the rule. To the extent that the CLEC does not provide those service elements, PAETEC's interpretation would violate the FCC's "long-standing policy" that LECs "should charge only for those services that they provide." *Eighth Report and Order*, 19 FCC Rcd 9118 (¶ 21).

added). Instead, PAETEC effectively replaces the qualified "may" in paragraph 13 with an unqualified "will," so that in PAETEC's view a CLEC "will" be permitted to charge an IXC the full benchmark rate in *any* "situation[] when a [C]LEC does not provide the entire connection between the end user and the IXC." *Id.* This reading is contrary to the text of the *Eighth Report and Order* and it is impossible to square with the FCC's holding in paragraph 21 that CLECs "should charge only for those services that they provide." *Id.* at 9118 (¶ 21).[7]

The district court thus erred when it found that a CLEC may charge IXCs for tandem switching if it provides an indirect connection to its end-

[7] PAETEC claims that this interpretation would "nullify" the distinction between "the amount a CLEC can charge when it is acting as an intermediate carrier from the amount a CLEC can charge when it is serving its own end-user customers." Pls. Reply 9, citing 47 C.F.R. § 61.26(b), (c), and (f). Not so. The FCC added new subsection (f) to Rule 61.26 in the *Eighth Report and Order*, 19 FCC Rcd at 9117 (¶ 18), to address confusion surrounding application of the benchmark rate when a CLEC is *not* serving the end-user customer. Some carriers, including PAETEC's predecessor in interest, argued that CLECs "should be permitted to charge the full benchmark rate when they provide any component of the interstate switched access services used in connecting an end user to an IXC." *Id.* at 9115 (¶ 14). The FCC disagreed, explaining "that the rate that a [C]LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing [I]LEC for the same functions." *Id*. at 9116 (¶ 17). Subsection (f), which codified that holding, was therefore necessary to clarify that CLECs that do not serve end-user customers (like those that do) "should charge only for those services that they provide." *Id.* at 9118 (¶ 21).

office switch (*i.e.*, when the CLEC's end office switch subtends a third-party's tandem switch). As both PAETEC and Verizon point out (Defs. Br. 39-45; Pls. Br. 45-46; Pls. Reply 17), the FCC's rules and orders do not establish different benchmark rates based on the manner in which the CLEC and the IXC interconnect. Rather, the FCC's orders have established a single benchmark rate, and that rate is computed based on the ILEC's rates for the services that a CLEC actually provides an IXC. *Eighth Report and Order*, 19 FCC Rcd at 9118 (¶ 21); *Clarification Order*, 23 FCC Rcd 2565 (¶ 26). The district court's holding undermines that policy because it would allow a CLEC to charge an IXC the ILEC rate for tandem switching provided by the ILEC, and not the CLEC itself.

For similar reasons, there is no merit to PAETEC's contention that a CLEC may charge an IXC for tandem switching, so long as it charges the IXC a "composite rate" (*i.e.*, a single, combined rate) for exchange access rather than an individual tandem switching rate element. Pls. Br. 23-24, 37-41; Pls. Reply 18-23. This novel distinction finds no support in the FCC's rules and orders. For example, FCC Rule 61.26 defines a single rate benchmark – and that benchmark does not vary based on how the CLEC elects to bill an IXC. *See* 47 C.F.R. § 61.26(a)(5) ("The *rate* for interstate switched exchange access services shall mean the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges.") (emphasis added). Similarly, in the *Seventh Report and Order,* 16 FCC Rcd at 9946 (¶ 55), the FCC explained that "[t]he only requirement is that the aggregate charge for these services, however described in [CLEC] tariffs, cannot exceed our benchmark." In other words, the rate *structure* a CLEC chooses for its tariff has no bearing on the maximum rate *level* established by Rule 61.26(c).

PAETEC's position is also inconsistent with the FCC's holdings in the *Eighth Report and Order* (19 FCC Rcd at 9118-19 (¶ 21)) and the *Clarification Order* (23 FCC Rcd 2565 (¶ 26)). The FCC in those decisions held that where a CLEC uses a single switch for access service, it may only charge an IXC a single switching rate (*i.e.*, either tandem or end office switching, but not both). *Clarification Order*, 23 FCC Rcd 2565 (¶ 26); *see also Eighth Report and Order,* 19 FCC Rcd at 9118-19 (¶ 21). It would be contrary to those orders to find that a CLEC may include in its composite rate a tandem switching fee that it would be prohibited from billing separately.

Indeed, PAETEC's element-specific pricing versus composite rate distinction is inconsistent with its own theory of the case. Throughout its briefs, PAETEC claims that the FCC permits CLECs to charge IXCs for tandem switching that they concededly do not provide in order to "foster the equality of access charge revenue" between ILECs and CLECs. Pls. Br. 24; *see also id.* at 17, 46-47; Pls. Reply at 15.[8] That claim is incorrect: the FCC enacted the CLEC access charge regime at issue to address the CLECs' misuse of market power by "eliminat[ing] from [its] rules opportunities for arbitrage and incentives for inefficient market entry." *Seventh Report and Order*, 16 FCC Rcd at 9936 (¶ 33); *see also id.* at 9924 (¶¶ 2-3). But even assuming *arguendo* that the FCC intended to maximize CLEC access charge revenue, it would make little sense for the Commission to enact regulations that force CLECs to charge less simply because they elect "a la carte" or element-specific pricing over a single, composite price.

## II. A TARIFF FILED ON FEWER THAN 15 DAYS' NOTICE IS NOT ENTITLED TO "DEEMED LAWFUL" STATUS UNDER 47 U.S.C. § 204(a)(3).

A tariff filed in a streamlined manner pursuant to 47 U.S.C. § 204(a)(3) "shall be deemed lawful and shall be effective 7 days [for a rate decrease] or 15 days [for a rate increase] after the date on which it is filed with the

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[8] In practice, PAETEC's theory actually promotes revenue inequality. Under PAETEC's theory, the CLEC could collect more than an ILEC for a given call because the ILEC can only charge an IXC for the services it provides, while a CLEC charging the composite rate would be permitted to bill an IXC for every access element listed in Rule 61.26(a)(3), even including elements it does not provide itself. Rather than equalize revenue opportunities between ILECs and CLECs, this would give the CLEC a competitive advantage over the ILEC.

Commission unless the Commission takes action … before the end of that 7-day or 15-day period." Therefore, a tariff proposing a rate increase will not be "deemed lawful" for purposes of section 204(a)(3) of the Act unless it is filed with 15 days' notice from its effective date.

Under the FCC rules then in effect,[9] a carrier must specify an effective date on the face of a new or revised tariff. *See* 47 C.F.R. § 61.23(a). The notice period required by section 204(a)(3) "begins on and includes the date the tariff is received by the Commission, but does not include the effective date." 47 C.F.R. § 61.23(b). Thus, in response to the Court's second question, Jan. 25, 2002 Order at 2, a tariff filed only 14 days before the carrier-designated "effective date" could not be "deemed lawful" under section 204(a)(3).

With respect to the Court's question about potential tolling of the "effective date," nothing in section 204(a)(3) of the Act or the FCC rules then in effect provides for such tolling. Contrary to PAETEC's claims, section 204(a)(3) does not set the effective date of the tariff filing "without regard to the 'Effective Date' written on the tariff pages being filed" so that a tariff

[9] 47 C.F.R. § 61.23, which was the operative rule at the time of this dispute, was removed from the Code of Federal Regulations effective November 17, 2011.

filed on a streamlined basis "'shall be deemed lawful' and 'shall be effective' 15 days after filing." Pls. Br. 64-65. Rather, the FCC's rules expressly provided that "[e]very proposed tariff filing must bear an effective date and, except as otherwise provided by regulation, special permission, or Commission order, must be made on at least the number of days notice specified in this section." In other words, the tariff's effective date marked the end of the notice period, 47 C.F.R. § 61.23(a), and the carrier determined that "effective date" under the FCC's former rules by filing within the periods specified by section 204(a)(3).

Indeed, the FCC has unequivocally stated that "all LEC tariff transmittals, other than those that solely reduce rates, shall be filed on 15 days notice" to receive "deemed lawful" treatment. *Implementation of Section 402(b)(1) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2203 (1997) (¶ 68). Moreover, the agency repeatedly has held that tariffs filed outside the statutory notice period, while permitted by the FCC's rules and precedent, do not qualify for "deemed lawful" treatment.[10] And this rule is widely understood by LECs.[11]

PAETEC's remaining arguments are no more persuasive. *See* Pls. Br. 65-66. As Verizon points out, PAETEC cannot rely on the FCC's treatment of tariffs filed during the 1995 federal government shutdown because "the government was not closed when PAETEC filed its December 2008 tariff"; rather, "PAETEC simply sent the tariff to the wrong address." Defs. Reply at 41. Likewise, PAETEC's reliance on cases involving contract interpretation and the FCC's rules requiring notice of discontinuance of service are inapposite because they do not involve the statutory notice requirements in section 204(a)(3) of the Act. Pls. Br. 65-66.

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[10] *See, e.g.*, *Administration of the North American Numbering Plan*, 20 FCC Rcd 2957, 2960 (¶ 7 n.31) (2005) (tariff filed on one day's notice was "not 'deemed lawful' under section 204(a)(3)"); *Protested Tariff Transmittal Action Taken*, 25 FCC Rcd 13327 (n.1) (Wir. Comp. Bur. 2010) (same for tariff filed on 16 days' notice); *Long-Term Telephone Number Portability Tariff Filings*, 14 FCC Rcd 3306, 3306-07 (¶ 2) (Com. Car. Bur. 1999) (same for tariff filed on 17 days' notice); *1997 Annual Access Tariff Filings*, 13 FCC Rcd. 5677, 5706 (¶ 78) (Com. Car. Bur. 1997) ("LEC tariffs not filed on either 7-days' or 15-days' notice will not be 'deemed lawful.'").

[11] *See, e.g.*, Letter from Consolidated Communications to FCC (Dec. 19, 2011) (conceding that a tariff filed on 16 days' notice is not subject to 47 U.S.C. § 204(a)(3)); Letter from Frontier Communications Solutions to FCC (Feb. 17, 2010) (explaining that "because the original tariff was not filed on 15 days' notice, Frontier foregoes … deemed lawful status.") (attached as Appendix A).

## III. CLEC SWITCHED ACCESS RATES ABOVE THE BENCHMARK ARE SUBJECT TO MANDATORY DETARIFFING AND CANNOT BE "DEEMED LAWFUL" PURSUANT TO 47 U.S.C. § 204(a)(3).

A CLEC tariff for interstate switched access services that includes rates in excess of the benchmark in Rule 61.26 is subject to mandatory detariffing. Under that regime, a carrier is *prohibited* from filing a tariff; any attempt to do so would violate the FCC's rules and render the prohibited tariff *void ab initio* if filed with the Commission. *Cf. Global NAPS, Inc. v. FCC*, 247 F.3d 252, 259-60 (D.C. Cir. 2001) ("Merely because a tariff is presumed lawful upon filing does not mean that it is lawful"; rather, "[s]uch tariffs still must comply with the applicable statutory and regulatory requirements" and "[t]hose that do not may be declared invalid."). Thus, such a tariff cannot benefit from "deemed lawful" status pursuant to section 204(a)(3) of the Act.

In the *Seventh Report and Order*, 16 FCC Rcd at 9956 (¶ 82), the FCC explained:

> [A] CLEC must negotiate with an IXC to reach a contractual agreement before it can charge that IXC access rates above the benchmark. During the pendency of these negotiations, or to the extent the parties cannot agree, the CLEC may charge the IXC only the benchmark rate. In order to implement this approach, we adopt mandatory detariffing for access rates in excess of the benchmark. That is, we exercise our statutory authority to forbear from the enforcement of our tariff rules and the Act's tariff requirements for CLEC access services priced above our benchmark.

The FCC's implementing rule, 47 C.F.R. § 61.26(b)(1), specifies that "a CLEC *shall not* file a tariff for its interstate switched exchange access services that prices those services … higher [than t]he rate charged for such services by the competing ILEC" (emphasis added).

Section 204(a)(3) is one of "the Act's tariff requirements" subject to the FCC's forbearance action, so "deemed lawful" status under that statutory provision is not available for CLEC switched access charges above the benchmark in Rule 61.26(c). Indeed, in an analogous context, the FCC has explained that it utilizes mandatory detariffing to "restrict" a LEC's "ability to assert 'deemed lawful' status." *AT&T Forbearance Order*, 22 FCC Rcd at 18729 (¶ 42) (conditioning forbearance relief granted to AT&T on its not filing or maintaining any interstate tariffs for certain broadband services); *cf. Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, (47 U.S.C. § 160(c)), for Forbearance*, 22 FCC Rcd 16304, 16331-32 (¶¶ 59-61) (2007) (explaining that "the Commission imposed a permissive detariffing regime through [Rule] 61.26 that permits the filing of tariffs … where the rates are *at or below* a benchmark that is 'the rate of the competing ILEC,'" and holding that the relevant ILEC could "obtain deemed lawful treatment of its tariffed rates," if it "compli[ed] with the … condition … that the rates for [its] switched access services not increase" above the benchmark rate) (emphasis added).

Relying on its forbearance authority under 47 U.S.C. § 160, the FCC found that the mandatory detariffing of above-benchmark rates would serve the public interest because "CLECs are positioned to wield market power with respect to access service." 16 FCC Rcd at 9957 (¶ 84). Mandatory detariffing, the FCC explained, "will provide greater assurance that [CLEC switched access charge] rates are just and reasonable and will likely prevent CLECs from using long distance ratepayers to subsidize their operational and build-out expenses." *Id.* at 9958 (¶ 86).

As noted above (*see* n.1), the FCC has authority to suspend and investigate streamlined tariffs filed pursuant to section 204(a)(3). *See* 47 U.S.C. § 204(a)(1). But it is not possible, as a practical matter, for the FCC to examine each of the hundreds of CLEC access tariffs filed with the agency within the 15 days before those tariffs go into effect. Once those tariffs become effective, moreover, the "deemed lawful" provision in the statute insulates the CLEC from refund liability should the FCC later find that its access rates exceed the benchmark in Rule 61.26. *Vitelco*, 444 F.3d at 669. That is why the FCC mandatorily detariffed CLEC access charge rates in excess of the benchmark: prohibiting those presumptively unreasonable rates from being tariffed in the first instance better serves the public interest by according IXCs (and, ultimately, consumers) more protection from unreasonably high interstate access rates than attempting to identify such unreasonable rates on an *ad hoc* basis after the tariffs are filed. *See Seventh Report and Order*, 16 FCC Rcd at 9958 (¶¶ 86-87).

If the Court were to find that a CLEC access tariff that includes rates exceeding the benchmark can enjoy "deemed lawful" status, it would undermine the mandatory detariffing regime imposed by the FCC. *Cf. Global NAPS*, 247 F.3d at 259-60 (affirming FCC's determination that a CLEC's federal tariff was *void ab initio* because the FCC had not authorized the tariff filing and instead directed the carrier to negotiate intercarrier compensation rates with other LECs).[12]

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[12] Relying on *Sprint Communications Co. L.P. v. Northern Valley Communications, LLC*, 26 FCC Rcd 10780, 10788 (¶ 17) (2011) ("*Northern Valley Order*"), PAETEC claims that "[a]bsent wrongdoing, deemed lawfulness applies." Br. 62. That is not the case with respect to CLEC switched access charge rates that exceed the benchmark rate in Rule 61.26(c). The *Northern Valley Order* did not address that issue, *see* 26 FCC Rcd at 10783-10788 (¶¶ 7-16), and Sprint (the complainant IXC) "admi[tted] [that] the Tariff rates [at issue] are no higher than the ILEC rates against which they are benchmarked pursuant to rule 61.26." *Id.* at 10788 (¶ 18).

## IV. A CARRIER THAT VIOLATES ITS TARIFF CAN BE SUBJECT TO OVERCHARGE LIABILITY.

If a carrier fails to comply with the terms of its own tariff, it is subject to liability under 47 U.S.C. § 203(c). That statutory provision holds that "no carrier shall … charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect." *Id.*

In the FCC's view, a CLEC could be subject to liability under section 203(c) if its tariff prohibited it from charging interstate switched access rates that are higher than the maximum rate permitted by Rule 61.26(c), and the CLEC nevertheless charged rates exceeding that benchmark. *See, e.g., Chesapeake and Potomac Tel. Co. of Maryland; Am. Tel. & Tel. Co.; Petition for Declaratory Ruling Regarding Intrastate Private Lines Used in Interstate Communications*, 2 F.C.C.R. 3528, 3532 (1987) (tariff filer "would apparently violate its statutory duties under Section 203(c) … if it refrained from billing and collecting the applicable rate for these lines.").

## CONCLUSION

As set forth above, the Court should affirm the district court's conclusion that a CLEC may not charge an IXC for tandem switching when the IXC directly connects with the CLEC. The Court should, however, reverse the district court's conclusion that a CLEC may charge an IXC for tandem switching functionality that the CLEC does not actually provide when an IXC indirectly connects to the CLEC through an ILEC tandem switch. This Court should reach both dispositions applying the reasoning set forth in Argument Section I, above.

The Court should also affirm the district court's holding that a tariff filed on 14-days' notice does not enjoy "deemed lawful" status pursuant to 47 U.S.C. § 204(a)(3).

Finally, the Court should reverse the district court's holding that a CLEC tariff that contains interstate switched access rates above the benchmark rate in Rule 61.26(c) enjoys "deemed lawful" status pursuant to section 204(a)(3) of the Act. Instead, the Court should find that such a tariff is *void ab initio* when filed.

Respectfully submitted,

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/s/ Counsel

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March 14, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PAETEC COMMUNICATIONS, INC. ET AL.,

Plaintiffs – Counterclaim Defendants - Appellees – Cross-Appellants,

v.

MCI COMMUNICATIONS SERVICES, INC. D/B/A VERIZON BUSINESS SERVICES; VERIZON GLOBAL NETWORKS INC.,

Defendants – Counterclaim Plaintiffs – Appellants – Cross-Appellees.

Nos. 11-2268 (consolidated with 11-2568) & 11-1204 (consolidated with 11-2569)

CERTIFICATE OF COMPLIANCE

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because the brief contains 7,256 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii), and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Pursuant to Third Circuit Rule 31.1(c), I further certify that the text of the electronic brief is identical to the text in the paper copies and that a virus detection program, Symantec Endpoint Protection version 11.0.4014.26, has been run on the file and that no virus was detected.

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March 14, 2012

# APPENDIX A

Consolidated communications

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Amended Transmittal No. 34

December 19, 2011

FRN #0010-1553-98

Marlene H. Dortch, Secretary
Federal Communications Commission
Washington, DC

Attention: Wireline Competition Bureau

This letter is an amended Transmittal Letter #34 to say we did not file Transmittal #34 pursuant to Section 204(a)(3). Transmittal #34 was filed on a 16 days notice and asked to become effective Jan 1, 2012.

All petitions, correspondence and inquiries in connection with this filing should be addressed to me at wendy.williams@consolidated.com or 936-633-6657.

Sincerely,

Wendy Williams
Regulatory Relations Specialist

Frontier Communications Solutions

Frontier Telephone Companies
180 South Clinton Avenue
Rochester, NY 14646

February 17, 2010

Second Amended Transmittal No. 2

Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

ATTENTION: WIRELINE COMPETITION BUREAU

Dear Secretary:

On February 12, 2010, Frontier filed its Transmittal No. 2, deferring the effective date of material filed under Transmittal No. 1 from February 23, 2010 to February 27, 2010. In Transmittal No. 2, Frontier stated that Transmittal No. 1 was being deferred in order to achieve the required 15-day statutory notice. Frontier acknowledges that, because the original tariff was not filed on 15 days' notice, Frontier foregoes the deemed lawful status that would otherwise be available under §203(a)(3) of the Communications Act.

Frontier Telephone Companies
180 South Clinton Avenue
Rochester, NY 14646

Second Amended Transmittal No. 2
February 17, 2010
Page 2

In accordance with the requirements of Section 61.21(a)(3) of the Commission's Rules, the FCC Registration Number (FRN) for Frontier is 0003-5763-52. Frontier is making this filing on behalf of issuing carriers with the following FRNs:

FRNs for participants in Tariff FCC No. 1

| | | |
|---|---|---|
| 0003-5726-17 | 0003-5839-37 | 0003-5743-16 |
| 0003-5745-89 | 0003-5745-63 | 0001-5968-81 |
| 0003-5745-48 | 0003-5745-22 | 0003-5733-91 |
| 0004-2605-68 | 0003-5745-06 | 0004-0549-38 |
| 0004-0367-03 | 0001-6713-20 | 0004-3410-95 |
| 0003-9342-05 | 0002-7227-42 | 0003-4132-42 |

FRNs for participants in Tariff FCC No. 2

| | | |
|---|---|---|
| 0003-4074-91 | 0003-4558-96 | 0003-2732-40 |
| 0003-2233-85 | 0004-9663-54 | 0003-2712-36 |
| 0005-0613-38 | 0004-1323-38 | 0005-0603-71 |
| 0004-1561-62 | 0005-0604-13 | 0005-0402-66 |
| 0004-9663-62 | 0004-2439-52 | 0005-0604-96 |
| 0005-0605-12 | 0003-2222-21 | 0005-0604-08 |
| 0005-0603-14 | 0003-3996-80 | 0005-0610-64 |
| 0005-0605-87 | 0005-0611-14 | 0002-7189-71 |

FRNs for participants in Tariff FCC No. 3

| | |
|---|---|
| 0002-6246-41 | 0002-5749-60 |

Frontier Telephone Companies
180 South Clinton Avenue
Rochester, NY 14646

Second Amended Transmittal No. 2
February 17, 2010
Page 3

Questions regarding this filing may be directed to me at:

Kevin Clinefelter
Frontier Communications
5th Floor
180 S. Clinton Avenue
Rochester, New York 14646

Voice Phone Number (585) 777-5754
Fax Number (585) 262-2625

Personal or facsimile service of any petitions which may be filed against this transmittal should use the above name, address, and fax number.

Respectfully Submitted,

Kevin Clinefelter
Manager, Pricing & Tariffs

11-2268, et al.

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

**Paetec Communications, Inc., et al., Plaintiffs**

**v.**

**MCI Communications Services, Inc. d/b/a Verizon Business Services, et al., Defendants**

## CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on March 14, 2012, I electronically filed the foregoing Brief for Amicus Curiae Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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/s/ Maureen K. Flood

# Exhibit 64

## Order, *In re GS Texas Ventures, LLC Tariff F.C.C. No. 1*, WCB/Pricing File No. 14-2 (rel. Sept. 8, 2014)

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | WCB/Pricing File No. 14-2 |
| GS Texas Ventures, LLC | ) | |
| Tariff F.C.C. No. 1 | ) | Transmittal No. 1 |
| | ) | |

**ORDER**

**Adopted: September 8, 2014** **Released: September 8, 2014**

By the Acting Chief, Pricing Policy Division:

## I. INTRODUCTION

1. On August 25, 2014, GS Texas Ventures, LLC (GS Texas Ventures) filed Tariff F.C.C. No. 1, a proposed tariff for "the regulations, rates and charges applying to the provision of interstate Access Services supplied to Buyers for the origination and termination of traffic to and from Central Office codes assigned to GS Texas Ventures, LLC."[1] The proposed tariff is scheduled to become effective on September 9, 2014.[2] Because the proposed tariff prohibits purchasers from obtaining Commission review of the tariff via the formal complaint process and violates the prohibition on call blocking contained in the Commission's orders[3] and the Communications Act of 1934, as amended (Act), we reject Transmittal No. 1 as patently unlawful, in violation of sections 201 and 208 of the Communications Act.[4]

## II. BACKGROUND

2. GS Texas Ventures filed the above-referenced proposed tariff on August 25, 2014, to become effective on September 9, 2014.[5] On September 2, 2014, Sprint Communications Company, L.P. (Sprint), CenturyLink Communications, LLC (CenturyLink), and Level 3 Communications, LLC (Level 3) (together, the "Petitioners") filed a petition to reject, or in the alternative, suspend and investigate the proposed GS Texas Ventures tariff filing.[6] The Petitioners assert that the GS Texas Ventures tariff is unlawful because it contains an arbitration provision that "attempt[s] to circumvent the Commission's review of the lawfulness of the tariff"[7] and "seeks to impose an obligation on interexchange carriers . . . to

[1] GS Texas Ventures, LLC Tariff F.C.C. No. 1, Application of Tariff (filed Aug. 25, 2014) (Tariff); *see* Letter from Patrick Phipps, QSI Consulting, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, Transmittal No. 1 (filed Aug. 25, 2014) (Transmittal Letter).

[2] Transmittal Letter.

[3] *See infra* note 20.

[4] 47 U.S.C. § 201(b), 208.

[5] Transmittal Letter.

[6] Petition of Sprint, CenturyLink, and Level 3 to Reject or to Suspend and Investigate (filed Sept. 2, 2014) (Petition).

[7] Petitioners contend that the arbitration provision at issue would "preclude those companies that [GS Texas

(continued . . . )

violate federal law by requiring them to illegally block telephone calls if the purchaser does not consent to the terms of the tariff."[8]

3. Section 2.10 of the proposed tariff sets forth the rules and regulations governing billing and payment for service. With respect to disputed charges, the proposed tariff states, in relevant part:

> All disputes between the Company and Buyer or Customer related to rates, terms and/or conditions (including collection of past due amounts) for services provided pursuant to this tariff, that cannot be settled through negotiation, shall be resolved by arbitration upon written demand of either party . . . . The arbitrator will have no authority to award punitive damages, exemplary damages, consequential damages, multiple damages, or any other damages not measured by the prevailing Party's actual or compensatory damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of this tariff.[9]

Section 2.13 of the proposed tariff discusses cancellation of service by the purchasers of GS Texas Ventures' access services, and states that:

> Buyers seeking to cancel Service have an affirmative obligation to block traffic originating from or terminating to the Company's Network. By originating traffic from or terminating traffic to the Company's Network, the Buyer will have constructively ordered the Company's Switched Access Service.[10]

## III. DISCUSSION

4. The Commission may reject a tariff filed by a carrier if the filing is "so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket."[11] The United States Court of Appeals for the District of Columbia Circuit has explained that the Commission has "the power and in some cases the duty" to reject a tariff that is demonstrably unlawful on its face, or that conflicts with a statute, agency regulation or order.[12] Under this standard, we reject Transmittal No. 1 because the proposed tariff violates section 201(b) and section 208 of the Act, as well as the Commission's orders that prevent carrier call blocking practices.

5. Pursuant to the Act, the Commission has the authority to review tariffs that have been filed to ensure their compliance with the Act or a rule or order of the Commission,[13] including the section 201(b) mandate that "[a]ll charges, practices, classifications, and regulations for and in connection with [a] communications service, shall be just and reasonable."[14] Section 208(a) of the Act authorizes complaints by any person "complaining of anything done or omitted to be done by any common carrier

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(continued from previous page . . . )
Ventures] claims are purchasers of services under the tariff . . . from invoking their statutory rights under Title II of the Communications Act" and "seeks to deprive the Commission of its essential role under Sections 201 and 203." Petition at 1.

[8] *Id.*

[9] Tariff at Section 2.10.4.I.

[10] Tariff at Section 2.13.1.B.

[11] *Municipal Light Bds. v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971); *cert denied*, 405 U.S. 989 (1972); *see also Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994); *American Broadcasting Cos. v. FCC*, 663 F.2d 133, 138 (D.C. Cir. 1980).

[12] *Associated Press v. FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

[13] 47 U.S.C. § 204.

[14] 47 U.S.C. § 201(b).

subject to the provisions of the Act,"[15] and under section 208, a party may obtain equitable relief or recover damages if it can establish that a carrier-initiated tariff violates the Act or a rule or order of the Commission.[16] Thus, even LEC tariffs that take effect on seven or 15 days' notice and are "deemed lawful" may be subsequently challenged at the Commission through the section 208 complaint process.[17]

6. Section 2.10.4.I of GS Texas Ventures' proposed tariff contains a provision mandating that all disputes relating to rates, terms, and conditions be resolved through arbitration, and further limits the arbitrator to prescribe only those remedies that are consistent with the tariff.[18] We agree with Petitioners that, as written and if enforceable, this language would preclude parties from challenging the tariff at the Commission as contemplated by the section 208 complaint process. Rather, once the proposed tariff has become effective and attained "deemed lawful" status, it purports to limit parties to challenging its terms solely through arbitration, without the ability to obtain independent review of the tariff's lawfulness by the Commission, including the full range of remedies available to the Commission under the Act.[19] In light of our finding that the arbitration requirement contained in the proposed tariff conflicts with section 208, we further find that GS Texas Ventures' inclusion of section 2.10.4.I in its proposed tariff is unjust and unreasonable under Section 201(b) of the Act. Thus, section 2.10.4.I is unlawful under section 201(b) and section 208 of the Act.

7. The Commission generally has established that call blocking is an unjust and unreasonable practice under section 201(b) of the Act, and that, in some instances, the practice may violate a carrier's duty under section 202 of the Act to refrain from unjust or unreasonable discrimination in practices, facilities, or services.[20] As such, no carrier may block, choke, reduce, or restrict traffic in any way, including to avoid paying transport and termination charges.[21] In this instance, section 2.13.1.B of GS Texas Ventures' proposed tariff directs purchasers seeking to cancel service under the tariff to block any traffic originating from or terminating to GS Texas Ventures' network.[22] As set forth above, it is

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[15] 47 U.S.C. § 208(a).

[16] *See, e.g.*, *Bell Atlantic Telephone Companies Tariff F.C.C. No. 1 Application for Review*, Transmittal Nos. 185 and 204, Memorandum Opinion and Order, 8 FCC Rcd 2732, 2733 n.8 (1993).

[17] *See Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Order, CC Docket No. 96-187, 12 FCC Rcd 2170, 2175-76, 2180-84, paras. 18-23 (1997).

[18] *See* Tariff at Section 2.10.4.I.

[19] Tariffs that are lawful at the time that they are filed may subsequently become unlawful based on particular circumstances. For example, as the Petitioners observe, the tariff filings of a competitive local exchange carrier (CLEC) could become void if the CLEC engages in access stimulation and exceeds the benchmarked rate. Petition at 5, 7; *see* 47 C.F.R. § 61.26(g).

[20] *Rural Call Completion*, WC Docket No. 13-39, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16154, 16155-56, 16169, Paras. 3, 29 (2013) (Rural Call Completion Order); *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Declaratory Ruling, 27 FCC Rcd 1351 (Wireline Comp. Bur. 2012) (noting that it may be a violation of section 202 to provide discriminatory service with respect to calls placed to rural areas) (2012 Declaratory Ruling); Connect America Fund *et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18028-29, para. 973 (2011) (*USF/ICC Transformation Order*), *pets. For review denied sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. May 23, 2014); *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Declaratory Ruling, 22 FCC Rcd 11629 (Wireline Comp. Bur. 2007) (2007 Declaratory Ruling).

[21] *Rural Call Completion Order*, 28 FCC Rcd at 16169, para. 29; *2012 Declaratory Ruling*, 27 FCC Rcd at 1352, paras. 3-4; *2007 Declaratory Ruling*, 22 FCC Rcd at 11631-32, paras. 6-7. In the *USF/ICC Transformation Order*, the Commission extended its longstanding prohibition on call blocking to providers of interconnected and one-way VoIP service. *USF/ICC Transformation Order*, 26 FCC Rcd at 18028-29, paras. 973-74.

[22] *See* Tariff at Section 2.13.1.B.

generally impermissible for carriers to block originating or terminating traffic, and carriers employing this practice would likely violate section 201(b) of the Act and the Commission's call blocking orders.[23] While the Commission has allowed call blocking "under rare and limited circumstances,"[24] the tariff requirement would apply regardless of whether such circumstances are present. Accordingly, section 2.13.1.B of the proposed tariff is unlawful under section 201(b) of the Act.

## IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201(b), and 208, and authority delegated by sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the proposed GS Texas Ventures, LLC Tariff F.C.C. No. 1 contained in Transmittal No. 1 IS HEREBY REJECTED;

9. IT IS FURTHER ORDERED that, pursuant to section 61.69 of the Commission's rules, 47 C.F.R. § 61.69, GS Texas Ventures, LLC SHALL FILE a supplement within five business days from the release date of this order noting that this proposed tariff was rejected in its entirety by the Federal Communications Commission.

10. IT IS FURTHER ORDERED that, the Petition of Sprint, CenturyLink, and Level 3 to Reject or to Suspend and Investigate the proposed GS Texas Ventures, LLC FCC Tariff No. 1 contained in Transmittal No. 1 is GRANTED as indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Pamela S. Arluk
Acting Chief, Pricing Policy Division
Wireline Competition Bureau

[23] While there may be ambiguity in how purchasers would apply the language of Section 2.10.4.I to avoid constructive ordering, we find that, on its face, the call blocking language in Section 2.10.4.I is unambiguous and therefore unlawful.

[24] *Policies and Rules Concerning Operator Services; Amendment of Policies and Rules Concerning Operator Service Providers and Aggregators; Petition for Declaratory Ruling of Securus Technologies, Inc.*, CC Docket Nos. 90-313 and 94-158, WC Docket No. 09-144, Declaratory Ruling and Order, 28 FCC Rcd 13913, 13917, para. 9 & n.33 (Wireline Comp. Bur. 2013) (noting that, for example, the Commission previously concluded that it was reasonable for AT&T to block calls to a chat line that was engaged in an arbitrage scheme with a competitive access provider to artificially inflate the access fees charged to AT&T). Additionally, the prohibition on call blocking has "no effect on the right of individual end users to choose to block incoming calls from unwanted callers." *2007 Declaratory Ruling*, 22 FCC Rcd at 11632 n. 21.

# Exhibit 65

## INS Amendment to GLCC TA
## (Aureon_00199-200)
## (dated June 18, 2014)

## CONFIDENTIAL
## MATERIALS OMITTED

# Exhibit 66

## AT&T Reply Legal Analysis,
## *AT&T Corp. v. Great Lakes Commc'ns Corp.*,
## FCC Docket No. 16-170
## (filed Oct. 6, 2016)

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | |
|---|---|
| **In the Matter of**<br>**AT&T CORP.**<br><br>**One AT&T Way**<br>**Bedminster, NJ 07921**<br>**(202) 457-3090**<br><br>***Complainant,***<br>***v.***<br><br>**GREAT LAKES COMMUNICATION CORP.**<br>**1713 McNaughton Way**<br>**Spencer, IA 51301**<br>**(712) 580-4700**<br><br>***Defendant.*** | **File No. EB-16-MD-001** |

**REPLY LEGAL ANALYSIS IN SUPPORT OF FORMAL COMPLAINT OF AT&T CORP.**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Statutes**

## INTRODUCTION

Great Lakes Communication Corp. ("GLCC") is a company that has demonstrated its inability to understand or comply with fundamental regulatory requirements.[1] Its Answer confirms that it either does not understand the Federal Communications Commission's (the "Commission") rules, or has elected to ignore them. Indeed, GLCC consistently turns regulatory requirements on their head:

- When the Commission said in its 2011 *Connect America Order* that it wanted to "curtail" access stimulation,[2] GLCC took that as a directive to expand its business, pumping **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** of traffic per year.

- In that same order, the Commission told GLCC that, if it wanted to continue to engage in access stimulation, it must reduce its rates to those of CenturyLink. *Id.* ¶ 689. Instead of simply adjusting its rates, GLCC re-wrote the fundamental terms of its access tariff so that its service would be different from CenturyLink's access service – including removing an offer to transport calls via a flat-rated, direct-trunked transport service, which is a lower cost method of hauling the enormous volumes of traffic GLCC stimulates.

- In 2008, the Commission instructed competitive local exchange carriers ("CLECs") to "permit an IXC [interexchange carrier] to install direct trunking from the IXC's point of presence to the competitive LEC's end office, thereby bypassing any tandem function."[3] However, when AT&T asked GLCC to allow such a connection, GLCC said **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]] [[BEGIN CONFIDENTIAL]]** [redacted]

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[1] Compl. ¶¶ 27-30; Ex. 16, *In re Great Lakes Commc'ns Corp.*, No. SPU-2011-004, at **12-15 (IUB Mar. 30, 2012) ("*IUB GLCC Order*") ("Great Lakes' confusion about Board orders, its own tariffs, where it is providing service, and its own business operations demonstrates that Great Lakes may not possess the managerial ability to comply with Board orders, provide accurate and complete information to the Board, and provide reasonably adequate local exchange service").

[2] *In re Connect America Fund*, 26 FCC Rcd. 17663, ¶¶ 33, 649 (2011) ("*Connect America Order*").

[3] *Access Charge Reform, PrairieWave Telecomms., Inc. Petition for Waiver of Sections 61.26(b) and (c), or in the Alternative, Section 61.26(a)(6) of the Commission's Rules*, 23 FCC Rcd. 2556, ¶ 27 (2008) ("*PrairieWave*").

[4] AT&T Ex. 6, Deposition of Joshua D. Nelson ("Nelson Dep.") at 120:2-13, taken Nov. 6, 2014.

[redacted] **[[END CONFIDENTIAL]]**

- In *Northern Valley I*, the Commission explained that CLECs electing to file tariffs for switched access must charge end users, as incumbent local exchange carriers ("ILECs") do, a fee for telecommunications services.[5] Rather than comply with that order, GLCC billed most of its conferencing and chat customers ("FCPs") for **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

- Under the Commission's rules for CLEC access services, which were first issued in 2001, the Commission "adopted a new regulatory regime,"[6] because "action was necessary" in order to "prevent CLECs from exploiting the market power in the rates that they tariff for switched access services."[7] The Commission's regulatory regime thus provides that (i) CLECs may only recover for access in two ways (a lawful tariff or a negotiated contract), and (ii) there is "no regulatory gap" that allows alternative state law claims. Yet, in GLCC's view, this means the Commission has "de-regulated" GLCC's access services, thereby permitting it to pursue alternative state law claims, seeking a recovery that exceeds its tariff rate by **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

Making matters worse, GLCC's response to AT&T's Complaint is to accuse AT&T of "absurdist nitpicking," GLCC Legal Analysis at 46, of "linguistic sorcery," *id.* at 22, and of "trying to put Great Lakes out of business, by any means necessary," *id.* at 8 n.22. The Commission should ignore GLCC's unfounded rhetoric. AT&T is one of the largest access payors, and it recognizes that it is obligated to pay access charges on traffic associated with access stimulation. But that obligation exists *only* pursuant to a negotiated contract or a lawful tariff that complies with the Commission's rules, including the requirements set forth above, which GLCC does not follow or even seem to understand.

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[5] *Qwest Commc'ns* v. *N. Valley Commc'ns*, 26 FCC Rcd. 8332, ¶¶ 8-9 (2011) ("*Northern Valley I*"), *recon denied*, 26 FCC Rcd. 14520 (2011) ("*Northern Valley II*"), *aff'd*, *N. Valley Commc'ns* v. *FCC*, 717 F.3d 1017 (D.C. Cir. 2013) ("*Northern Valley III*").

[6] Eighth Report and Order and Fifth Order on Reconsideration, *In re Access Charge Reform*, 19 FCC Rcd. 9108, ¶ 1 (2004) ("*Eighth Report and Order*").

[7] Seventh Report and Order, *In re Access Charge Reform*, 16 FCC Rcd. 9923, ¶¶ 2, 30-34 (2001) ("*CLEC Access Order*").

As a general matter, the Commission's CLEC access rules are intended to "mimic the operation of the marketplace," by allowing CLECs to file tariffs only when they offer services at rates no higher than the rates the benchmark ILEC charges for functionally equivalent services. *CLEC Access Order* ¶ 3; *see id.* ¶¶ 37, 55; *Northern Valley I* ¶¶ 5-11; 47 C.F.R. § 61.26. When CLECs follow the Commission's rules, IXCs will often be indifferent as to whether a CLEC or ILEC is providing access because the two services must be functionally equivalent, and priced at the same levels. GLCC, however, has no real interest in competing with CenturyLink or any other local carrier. Its primary business model is, and has been, to manipulate the flaws in the Commission's intercarrier compensation regime, abuse its bottleneck monopoly, "exploit[] the market power in the rates that [it] tariff[s]" by aiding in the stimulation of traffic that would not otherwise exist, and force AT&T to take GLCC's services on terms that GLCC dictates. GLCC's conduct is contrary to the public interest and the Commission's rules. GLCC's defenses of its conduct lack merit, and should be rejected.

The remainder of AT&T's Reply is organized as follows. Part I explains that GLCC has no valid defense to AT&T's claim that GLCC committed an unreasonable practice under Section 201(b), in violation of the Commission's CLEC access rules, by failing to provide or permit a direct connection. Part II addresses GLCC's defenses to AT&T's claim that GLCC violated its tariff and the Commission's rules by billing AT&T for access services on traffic for which GLCC did not bill or collect a fee for telecommunications service. Part III demonstrates that the District Court was correct in dismissing GLCC's alternative state law claims, and that GLCC's claim that the Commission's rules authorize such claims has no merit.

## I. GLCC'S REFUSAL TO PROVIDE OR ALLOW A DIRECT CONNECTION IS AN ABUSE OF ITS BOTTLENECK MONOPOLY, AND VIOLATES SECTION 201(b) OF THE ACT AND THE COMMISSION'S RULES FOR CLECs THAT ENGAGE IN ACCESS STIMULATION.

Contrary to GLCC's claims, Count I of AT&T's Complaint does not seek a "new" legislative rule, or any amendment to the Commission's rules or interpretation of Section 251 of the Act. Rather, AT&T is simply asking the Commission to enforce its existing rules, specifically its longstanding CLEC access rules and its 2011 rules regarding access stimulating LECs.[8] GLCC violated those rules in two ways, and enforcing them against GLCC on a retroactive basis is fully consistent with the norms of agency adjudication.

*First*, CLEC access rules "require that tariffed CLEC charges for 'interstate switched exchange access services' be for services that are 'the functional equivalent' of ILEC interstate switched exchange access services." *Northern Valley I* ¶ 8. GLCC has violated these rules, because its access services are not "the functional equivalent" of the access services of CenturyLink, the ILEC against which it must benchmark its rates.

Prior to the Commission's *Connect America Order*, GLCC filed a tariff with terms of service that were roughly equivalent to those offered by CenturyLink, but with rates that were much higher than CenturyLink's rates. In response to the *Connect America Order*, GLCC did not simply lower the rates in its tariff, as the Commission required. Rather, GLCC re-wrote its tariff in several fundamental respects, including by eliminating the option to purchase "flat-rated" "direct-trunked transport" that would bypass tandem switching and per-minute, per-mile

[8] As such, GLCC's lengthy discussion of the distinctions between rulemaking and adjudication is beside the point. *See* GLCC Legal Analysis at 25-35; *see also infra* pp. 19-20 (discussing GLCC's argument).

tandem-switched transport.[9] At the traffic volumes stimulated by GLCC's FCPs, a flat-rated transport service is far less expensive than the per-minute rates that INS charges to transport calls between Des Moines and Spencer, the location of GLCC's switch.[10] Unlike in GLCC's prior tariff and in CenturyLink's tariff, which offer at least two options for transporting traffic (both flat-rated and per-mile), GLCC's current tariff no longer offers any flat-rated transport service. *See* Compl. ¶¶ 34, 40.

As such, GLCC's revised tariff violates the *Connect America Order* and the Commission's benchmarking rule: given the large traffic volumes that GLCC has stimulated, GLCC's tariffed access service is *not* functionally equivalent to CenturyLink's service. *See Northern Valley I* ¶ 8.[11] Rather, it forces IXCs to use and pay for the highest-cost transport service. To comply with the Commission's rules, GLCC, as a CLEC engaged in access stimulation, should either have retained the flat-rated transport offering in its tariff, or reduced its rates to reflect the fact that its tariffed access service is inferior, and results in higher costs to its IXC customers.

*Second*, even if the Commission's rules did not require GLCC, when engaged in access stimulation, to *provide* a direct connection by tariff, its rules and its decision in *PrairieWave* require GLCC to "*permit* an IXC to install direct trunking from the IXC's point of presence to

[9] *See* AT&T Ex. 17, GLCC FCC Tariff No. 1, Orig. Page 6-3, filed Sept. 1, 2005 (diagram of GLCC's "components of Switched Access Service," which includes "Direct-Trunked Transport (flat-rated)" and provides direct transport between GLCC's end office switch and an IXC serving wire center and point of presence).

[10] Declaration of John W. Habiak ("Habiak Decl.), ¶¶ 13-29, dated Aug. 15, 2016.

[11] Indeed, GLCC concedes that tandem-switched transport service is "very different" from flat-rated direct trunked transport service, *see, e.g.*, GLCC Legal Analysis at 14, 16, 22, 23, 24, 33, and thus, when a carrier engages in access stimulation on a scale like that of GLCC, a tariff offering both a flat-rated direct transport option and a tandem-switched transport option is not functionally equivalent to tariff offering only a tandem-switched transport service.

[redacted] **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]] [[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** By refusing to allow a direct connection, GLCC violated the Commission's existing precedents and Section 201(b) of the Act.

### A. GLCC's Arguments In Support Of Its Refusal To Direct Connect Lack Merit.

#### 1. GLCC's Obligation To Provide Or Allow A Direct Connection Arises Not Under Section 251, But Under Section 201 And Commission Rules That Govern CLECs Engaged In Access Stimulation.

GLCC's primary argument is that CLECs generally are not obligated under Section 251 of the Act to interconnect directly, and it points to testimony from AT&T that acknowledges this statement of law. GLCC Legal Analysis at 1-2, 8-11. AT&T has not, however, alleged a claim under Section 251. Rather, AT&T claims that (1) GLCC, as a CLEC engaged in access stimulation, violated the Commission's "functional equivalence" rules, which implement Section 201(b) of the Act, by filing a tariff that, unlike CenturyLink's tariff, omits the transport option that is demonstrably less expensive for GLCC's traffic volumes; and (2) GLCC improperly

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[12] *PrairieWave* ¶ 27 (emphasis added).

[13] **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

refused to permit AT&T to install direct trunking to GLCC's end office, in violation of the Commission's *PrairieWave* decision, which also implements Section 201(b) of the Act.

Even though CLECs generally do not have an obligation under Section 251(a) to interconnect directly with other carriers, the interconnection obligations of a LEC as to an IXC have long been subject to Section 201.[14] As to CLECs, beginning in 2001, the Commission has relied on Sections 201(b) and 203 to regulate the rates, terms and conditions CLECs may impose upon IXCs through tariffs for switched access services. *CLEC Access Order* ¶¶ 2-44, 145. Specifically, the Commission found that because of their bottleneck monopolies, CLECs have the incentive and ability to overcharge IXCs and IXC customers. *Id.* ¶¶ 2, 30, 34.

To constrain abuses of those bottleneck monopolies, the Commission adopted benchmarking rules, implemented under Sections 201 and 203, for CLECs tariffing their switched access services. *CLEC Access Order* ¶¶ 3, 145; AT&T Legal Analysis at 7-10. Because the Commission recognized that rates have "meaning only when one knows the services to which they are attached," *Eighth Report and Order* ¶ 14, the CLEC's tariffed offering of access service has to include "the functional equivalent of ILEC interstate exchange access services." *Northern Valley I* ¶ 8. In addition, in 2008, the Commission explained that *all* CLECs should "permit an IXC to install direct trunking from the IXC's point of presence to the competitive LEC's end office, thereby bypassing any tandem function." *PrairieWave* ¶ 27. And, in 2011, because of additional abuses by CLECs engaged in access stimulation, the Commission required access-stimulating CLECs to benchmark against, and offer service

[14] *E.g., In re Specialized Common Carrier Services*, 29 F.C.C. 2d 870 (1971); *Connect America Order* ¶ 1338 n.2435; *cf*. AT&T Legal Analysis at 20 n.92 (explaining that Section 251(a) obligations for telecommunications carriers like CLECs were premised on the view that they did not have bottleneck monopolies, such as those that CLECs have over access).

functionally equivalent to, the lowest-priced, price cap LEC in the state. *Connect America Order* ¶¶ 688-89.

As such, under the Commission's CLEC access rules, GLCC (like all CLECs) is obligated to permit IXCs to install direct trunking to its switch, *PrairieWave* ¶ 27, and, since 2011, as an access stimulating LEC, GLCC has been obligated to benchmark its tariffed access service against CenturyLink's switched access service, which offers IXCs the ability to obtain flat-rated, direct-trunked transport. *See, e.g.*, AT&T Ex. 10, CenturyLink FCC Tariff No. 11, Orig. Pages 6-9, 6-12, 6-225. Both of those obligations arise from the Commission's rules implementing Sections 201 and 203 – not from Section 251.

Further, nothing in Section 251(a) is at odds with the Commission's rules issued under Sections 201 and 203. Section 251 was added to the Act in 1996, as part of Congress's effort to address *local* competition. Section 251(a) provides the minimum duty of indirect connection on *any* telecommunications carrier, in order to ensure that callers can complete calls to and from the customers of all other carriers.[15] Section 251(a) does not, as GLCC claims, establish both a floor *and* a ceiling for the interconnection obligations of CLECs when they provide switched access services to IXCs, especially when they are engaged in access stimulation schemes. *Cf. Local Competition Order* ¶ 997; AT&T Legal Analysis at 20 n.92. Rather, because of concerns about CLEC abuse of their bottleneck monopolies, the Commission has invoked Section 201(b) to

[15] *See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 997 (1996) ("*Local Competition Order*") (subsequent history omitted).

impose on CLECs additional interconnection obligations with respect to switched access services that CLECs elect to offer via tariff.[16]

Finally, GLCC's reliance on Mr. Habiak's testimony in another proceeding regarding his understanding of Section 251 is entirely misplaced. The facts of the case in which Mr. Habiak testified are far different than those in this case. *See* Reply to Ans. ¶ 4. That case involved an entirely different routing scheme, and the tandem-switched transport charges at issue in that case should have been only about $0.001 per minute under the Commission's benchmark. *Id.* At that rate, and because much lower traffic volumes were at issue, there was no need to use a direct connection. *Id.* By contrast, the tandem charges that INS imposes on GLCC's traffic are about 0.9 cents per minute.

#### 2. The Commission's Benchmarking Rules For Access-Stimulating LECs Require GLCC To Offer A Direct Connection Like CenturyLink Does.

GLCC claims that AT&T's request for a direct connection "violates" the Commission's CLEC access rules, and specifically the list of illustrative rate elements in 47 C.F.R. § 61.26(a)(3). GLCC Legal Analysis at 1-2, 14-15, 22-24. This argument ignores the text of that regulation, as well as the Commission's interpretation of the functional equivalence requirement.

According to GLCC, the Commission "clearly defined the ILEC bundle of access services against which CLECs must benchmark their rates, and 'direct-trunk transport' is conspicuously absent from that list." GLCC Legal Analysis at 14-15. However, the list that the

[16] Although CLECs generally do not have the obligation under Section 251(a) to provide direct connections like ILECs do, all CLECs must permit IXCs to install direct trunks to CLECs' end offices. *PrairieWave* ¶ 27. Further, in circumstances like those presented here, where a CLEC (i) has engaged in access stimulation and (ii) has filed a tariff with rates that match the lowest-priced price cap LEC in the state, that CLEC must provide a direct connection in its tariff in order to fulfill its obligation, under the Commission's CLEC access rules and Section 201(b), to offer service that is functionally equivalent to that price cap LEC. *Northern Valley I* ¶ 8; 47 C.F.R. § 61.26.

Commission included in Section 61.26(a)(3) is what a CLEC "typically" would offer, and GLCC, as one the nation's largest access-stimulating CLECs, is not typical. *See* 47 C.F.R. § 61.26(a)(3); AT&T Legal Analysis at 22. Further, GLCC's view that the "functional equivalence" requirement is limited to matters expressly listed in section 61.26(a)(3) cannot be squared with Commission precedent. In *Northern Valley I*, for example, the Commission construed the functional equivalence standard to impose obligations on CLECs that are not specified in the text of Section 61.26, but which nonetheless follow from tethering CLEC rates and services to those of a benchmark ILEC. *Northern Valley I* ¶¶ 5-11. If GLCC's interpretation of Section 61.26(a)(3) were correct, then *Northern Valley I* would be invalid. What is critical here is that GLCC's tariffed access service, which eliminates cost-effective transport in favor of a far more costly transport service, is not functionally equivalent to CenturyLink (or even to GLCC's prior tariff).

Further, GLCC's artificially narrow interpretation of Section 61.23(a)(3) is simply inconsistent with the text of the regulation. The text of § 61.26(a)(3) defines a CLEC's switched access service to "include" the functional equivalent of ILEC services "typically" associated with the listed rate elements. 47 C.F.R. § 61.26(a)(3). It remains a canon of construction that, where "[a] definition is introduced with the verb 'includes,' . . . the examples enumerated in the text are illustrative, not exhaustive."[17] Indeed, the Commission itself has stated that the list of rate elements is not exclusive, but instead "illustrate[s] what might be considered the 'functional equivalent' of [ILEC] access services." *Eighth Report and Order* ¶ 13 n.48; *see also CLEC Access Order* ¶ 55 n.126.

[17] *Christopher* v. *SmithKline Beecham Corp.*, --- U.S. ---, 132 S. Ct. 2156, 2160 (2012).

GLCC states that tandem-switched transport is "very different" from direct-trunked transport, GLCC Legal Analysis at 14, implying that the Commission, having expressly included the former in the text of Section 61.26(a)(3), cannot lawfully require GLCC to provide the latter. However, the differences between tandem-switched transport and direct-trunked transport support AT&T's position, not GLCC's.[18] The fact that the services are "very different" means that, at the traffic volumes stimulated by GLCC, GLCC's tariff (which lacks a flat-rated direct-trunked transport option) is "very different" from, and not functionally equivalent to, CenturyLink's tariff (which does include such an option).

GLCC seems to think that because Section 61.26(a)(3) expressly mentions tandem-switched transport but not direct-trunked transport, then direct-trunked transport is outside the scope of the rule. Not true.[19] The Commission's benchmark rules encompass more than tandem-switched transport and the other listed rate elements. The rules apply to "switched exchange access services," 47 C.F.R. § 61.26, "however described in tariffs." *CLEC Access Order* ¶ 55. As the Commission explained, switched access service typically entails "a

[18] The differences are that tandem-switched transport goes through a tandem switch, and is typically priced (albeit not by INS) on a per-minute, per-mile basis, whereas direct-trunked transport bypasses the tandem, and is generally flat-rated (as in GLCC's initial tariff, AT&T Ex. 17, GLCC FCC Tariff No. 1, Orig. Page 6-3). As such, direct-trunked transport is plainly less costly where, as here, an IXC is required to transport large volumes of traffic to a single end office. By contrast, when an IXC wants to transport to multiple end offices, but only small volumes of traffic to each end office, then it is generally less expensive to establish a connection only to the tandem, and pay for the tandem-switched transport to each office.

[19] GLCC claims that the omission of "direct-trunked transport" from the list of elements in section 61.26(a)(3) must have been intentional, because that service is described elsewhere in the Commission's rules. *See* GLCC Legal Analysis at 22-23 & n.71 (citing 47 C.F.R. §§ 69.112, 69.2(oo)). The rules that GLCC contrasts with section 61.26 plainly do not support such an inference, as they were promulgated at a different time, pursuant to a different section of the Act, and for a different regulatory purpose. *See In re Review of Commission's Rules & Policies Affecting Conversion to Digital Television*, 17 FCC Rcd. 15978, ¶ 30 (2002) (refusing to infer deliberate exclusion of language at issue where the disparate provisions "were enacted as part of entirely different Acts, separated by a significant time period.").

connection between the LEC switch and the serving wire center (often referred to as 'interoffice transport')." *Id.* Both tandem-switched transport and direct-trunked transport provide a connection between the LEC switch and the serving wire center, and both are types of interoffice transport. As such, both of these forms of transport are encompassed by the Commission's CLEC access rules. The fact that direct-trunked transport is not expressly listed in Section 61.26(a)(3) does not mean it is not a switched access service that, in the circumstances presented here, GLCC must offer in order to meet its obligation to provide services functionally equivalent to CenturyLink. It is not listed because, as noted above, CLECs "typically" (*id.*) do not need to offer it, because most CLECs are not engaged in access stimulation.

### 3. GLCC's "Rate Structure" Argument Is A Red Herring.

GLCC relies on a snippet from the *CLEC Access Order* that the Commission's rules do not require "'any particular rate elements or rate structure.'"[20] This statement has no effect in this case. As the Commission has emphasized, regardless of whether a CLEC files a composite rate or tariffs rates for individual rate elements, the "aggregate charge" cannot exceed what the ILEC would charge for a functionally equivalent service. *CLEC Access Order* ¶ 55. As the Commission explained in a relevant appellate brief, "the rate *structure* a CLEC chooses for its tariff has no bearing on the maximum rate *level* established by Rule 61.26(c)."[21]

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[20] GLCC Legal Analysis at 15, 24 (quoting *CLEC Access Order* ¶ 55). Paragraph 55 of the *CLEC Access Order*, read as a whole, flatly contradicts GLCC's claim that only tandem-switched transport is addressed by the Commission's CLEC access rules. Indeed, it makes clear that the "switched access services" covered by the Commission's rules include all types of "interoffice transport." *Id.* Further, the footnote to this paragraph makes clear that, while the benchmark rules apply to certain specific rate elements, the Commission's rule is not necessarily limited to those specified elements *Id.*; *cf.* 47 C.F.R. § 61.26(a)(3).

[21] AT&T Ex. 98, Brief for Amicus Curiae FCC, *PaeTec Commc'ns, Inc.* v. *MCI Commc'ns Servs. Inc.* ("*PaeTec-MCI*"), Nos. 11-2268, et al., at 20, 25-28 (3d Cir., filed Mar. 14, 2012) ("FCC Amicus Br.").

Here, GLCC elected to tariff rates for individual elements, and it set the rates for those rate elements at the same level as CenturyLink's rates.[22] GLCC's service, however, is *not* functionally equivalent to CenturyLink's service and consequently its rates fail to meet the benchmark. Given its choice to tariff individual rate elements at rates equal to CenturyLink, GLCC could not simply omit the rate element (direct-trunked transport) in CenturyLink's tariff that offered the lowest rate to transport the high traffic volumes that GLCC has stimulated. Having elected to do so, GLCC effectively raised the "aggregate charge" to AT&T to a rate that far exceeds the applicable CenturyLink rate. While nothing in the Commission's rules would preclude GLCC from using a composite rate, GLCC did not elect to do so.[23]

#### 4. GLCC Also Violated The Commission's Rules And Its *PrairieWave* Decision By Refusing AT&T's Request To Install A Direct Connection.

GLCC's refusal to permit AT&T to obtain its own transport to connect to GLCC's switch violates the Commission's decision in *PrairieWave* and provides an independent basis for finding that GLCC violated Section 201(b) of the Act. *See* AT&T Legal Analysis at 13-24. GLCC offers three arguments to justify its position, but none have merit.

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[22] *See* AT&T Ex. 8, GLCC FCC Tariff No. 2, Orig. Page Nos. 54-55. The District Court found that GLCC's tariff did not actually permit GLCC to charge for any transport itself. Order on Mots. For Summ. J., *Great Lakes Commc'n Corp.* v. *AT&T Corp.* ("*GLCC-AT&T*"), No. 13-4117, 2015 WL 12551192, at **17-21 (N.D. Iowa Jun. 8, 2015).

[23] Contrary to GLCC's argument, AT&T is not asking the Commission to "reverse" its holdings in the *Eighth Report and Order*. GLCC Legal Analysis at 3-4 (citing *Eighth Report and Order* ¶¶ 9, 13). According to GLCC, that *Order* holds that, if a CLEC serves the end user, it is entitled to the "full benchmark" rate of the ILEC. *Id.* GLCC misreads the *Order*. As the Commission has explained, a CLECs can charge the "full benchmark" only when it serves the end user and provides all of the same functionality as the ILEC, *i.e.*, all tandem *and* end office functions. *See* AT&T Ex. 98, FCC Amicus Br. at 12-21. A CLEC cannot charge for any services that it does not provide, and thus even when it serves the end user, it cannot charge, for example, for tandem services that only the ILEC provides. *Id.*

*First*, GLCC claims that AT&T never "meaningfully requested" a direct connection.[24] As GLCC has conceded elsewhere in its submission, this is flatly wrong.[25] Although GLCC's CEO now claims to have lacked an understanding of certain unspecified aspects of AT&T's requests, **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

*Second*, GLCC argues that "*PrairieWave* is irrelevant because this is not about whether AT&T can bypass *Great Lakes*' tandem switch; AT&T wants to bypass *INS*'s tandem switch." GLCC Legal Analysis at 21. However, when the Commission stated that a CLEC should "permit an IXC to install direct trunking . . . , thereby bypassing any tandem function," it meant what it said: that an IXC should be permitted to "bypass[] *any* tandem function." *PrairieWave* ¶ 27 (emphasis added). The Commission's holding is not limited, as GLCC seems to believe, to permitting IXCs to bypass only those tandem functions provided by a LEC that also owns the end-office switch.[26]

*Third*, GLCC claims that AT&T does not have a right to bypass INS's switch because **[[BEGIN CONFIDENTIAL]]** [redacted]

[24] GLCC Legal Analysis at 20; Ans. ¶ 56 (claiming AT&T has not offered competent proof of its request).

[25] Ans. ¶ 56 (GLCC's CEO testifying "concerning the reasons for *declining AT&T's initial direct connection request*.") (emphasis added). GLCC's claim that AT&T did not previously request a direct connection under GLCC's prior tariff , *id.* ¶ 55, misses the point. Prior to filing its revised tariff in 2012, GLCC provided service to AT&T under negotiated contracts, not the tariff. *See* Habiak Reply Decl. ¶ 3.

[26] As further noted by the Commission, one of the concerns raised regarding whether CLECs could charge for tandem and end-office switching was that "it . . . could lead to IXCs being billed by multiple competitive LECs and incumbent LECs." *PrairieWave* ¶ 23. The Commission found that there was limited risk that this would occur, "[s]o long as an IXC may elect to direct trunk to the competitive LEC end offices, and thereby avoid the tandem switching function and associated charges." *Id.* ¶ 27.

[redacted] **[[END CONFIDENTIAL]]**

Further, and more significantly, AT&T's ability to actually procure the transport necessary for a direct connection in no way excuses GLCC's failure to live up to its common carrier obligations. As explained above, GLCC was required to permit such connections. Thus, the Commission should disregard GLCC's claim that its violation should be excused because of its alleged belief that AT&T could not procure the transport.

### B. By Refusing To Provide Or Permit A Direct Connection To Its Network, GLCC Forces AT&T To Use INS's Far More Costly Transport Service.

GLCC asserts that it should not be held responsible for the consequences of its failure to provide or permit a direct connect because "[GLCC] does not require AT&T to use INS" and AT&T had other options to route calls to GLCC. GLCC Legal Analysis at 21 (citing Declaration of Josh Nelson ("Nelson Decl."), ¶ 20, Sept. 14, 2016). This is simply not accurate. **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted] **[[END HIGHLY CONFIDENTIAL]]**

*Second*, within the LERG, GLCC lists INS as the tandem carrier IXCs should route through to terminate traffic to GLCC. *See* Habiak Reply Decl. ¶ 13. While the LERG is an industry database, and the designations therein have no binding legal effect, GLCC's designation of INS in the LERG undercuts any claim that AT&T somehow freely elected to use INS's services.

*Third*, GLCC's criticism of the potential savings calculated by Mr. Habiak are misplaced because, among other things, the savings that AT&T would realize would still be substantial. Further, as discussed in Mr. Habiak's reply declaration, there are a number of flaws in GLCC's analysis. *See* Habiak Reply Decl. ¶¶ 16-24. **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

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27 **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

### C. GLCC's Procedural Challenges Are Baseless.

GLCC raises a number of procedural challenges to AT&T's Count I, but all lack merit. *First*, GLCC argues that the claim in Count I was "not referred to the Commission." Ans. ¶ 3; GLCC Legal Analysis at 9-11. However, GLCC's argument is flatly inconsistent with the plain language of the District Court's orders.[28] And because AT&T's direct connection claim was referred and dismissed without prejudice, GLCC's argument that the merits of AT&T's direct connect claim have been addressed "*three* times by *three* different judges," GLCC Legal Analysis at 10, is inaccurate.

*Second*, neither the "deemed lawful" doctrine nor the filed rate doctrine insulate GLCC's unreasonable practices from the Commission's review. The Supreme Court has held that the filed rate doctrine "assuredly does *not* preclude avoidance of the tariff rate . . . through claims and defenses that are specifically accorded by the [Act] itself." *Reiter* v. *Cooper*, 507 U.S. 258, 266 (1993). AT&T's claims against GLCC under Sections 201(b) and 203 are claims "accorded" by the Act, and the Commission has repeatedly held that "the Filed Rate Doctrine does not insulate tariffs from legal challenges under section 201(b)." *Bell Atlantic-Delaware* v. *Global NAPs*, 17 FCC Rcd. 7902, ¶ 25 (2002) (citing cases). GLCC's filed rate defense should thus be rejected.

GLCC's "deemed lawful" claim is also inapplicable to this case. As a general matter, tariffs cannot be used to circumvent the specific duties that the Act and the Commission's rules place on carriers. *Global NAPS, Inc.* v. *FCC*, 247 F.3d 252, 259-60 (D.C. Cir. 2001) ("tariffs

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[28] *See* Reply to Ans. ¶ 3. After the Court's referral orders, GLCC raised this same argument to the Commission Staff, which rejected it. What is more, at the District Court, GLCC itself said that AT&T's direct connection claim was "dismissed without prejudice *so that AT&T may pursue that claim at the FCC*." Mem. in Support of Mot. in Limine to Exclude Testimony of Expert Witness, David I. Toof, Ph.D., at 22, filed Dec. 17, 2014 (emphasis added).

still must comply with the applicable statutory and regulatory requirements").[29] Under the Commission's rules, GLCC's tariff must be functionally equivalent to that of CenturyLink. GLCC cannot effectively amend that requirement by filing a tariff that is not functionally equivalent, then waiting for the tariff to go into effect, and claiming that it is not liable because its tariff became "deemed lawful." Likewise, GLCC is obliged by the Commission's rules and *PrairieWave* to permit AT&T to install direct trunks. GLCC cannot avoid that requirement by filing a tariff that omits or purports to deny AT&T that right, and claiming that its unreasonable practice of denying such connections is immune from review because its tariff is deemed lawful.[30]

In any event, because GLCC's tariff violated the Commission's CLEC access benchmark rule when the tariff was filed, the Commission's rules provide that GLCC was prohibited from filing such a tariff. 47 C.F.R. § 61.26; *CLEC Access Order* ¶¶ 82-87 (mandatory detariffing). The Commission addressed this issue in its amicus brief in *PaeTec-MCI*. In that case, the Third

[29] *See also PaeTec Commc'ns, Inc.* v. *CommPartners, LLC*, No. 08–0397, 2010 WL 1767193, at **4-5 (D.D.C. Feb. 18, 2010) (a "filed tariff cannot be inconsistent with the statutory framework pursuant to which it is promulgated"); *AT&T Servs. Inc.* v. *Great Lakes Comnet, Inc.*, 30 FCC Rcd. 2586, ¶ 28 (2015) ("*Comnet*"); *In re GS Texas Ventures, LLC*, 29 FCC Rcd. 10541, ¶¶ 5-6 & n.19 (2014). In fact, counsel to GLCC has so contended in *Commpartners*. In that case, representing the access customer, GLCC's counsel argued that "tariff provisions are void ab initio to the extent such terms are applied to ends that the statutory framework does not allow those terms to reach." AT&T Ex. 99, Mem. of Points and Authorities in Opp. to Mot. to Amend, et al., filed in *Paetec Commc'ns* v. *Commpartners*, Civ. No. 1:08-cv-00397-JR, at 22 (Apr. 30, 2010); *see id*. at 21 (stating the court properly "recognized the mischief that can attend streamlined tariffing procedures" and citing the portion of the Order quoted in the text above); *id.* at 24 (arguing that there is no authority for the "sweeping proposition" that a carrier can use a tariff under Section 204(a)(3) to "supplant Congress, the FCC, and now this Court simply by revising its tariff with a one sentence fragment on 14 days' 'notice'").

[30] To take another example, under *Northern Valley I*, a CLEC that files an access tariff is obligated to charge fees for telecommunications service to end users. A CLEC filing a tariff that lacks any such requirements is patently unlawful. *See Northern Valley Commc'ns, Revisions to FCC Tariff No. 3*, 26 FCC Rcd. 9280 (2011). If such a tariff were allowed to go into effect, the CLEC is not free to disobey the Commission's holding in the *Northern Valley* proceedings, by claiming that its access tariff has been "deemed lawful."

Circuit requested that the Commission file an amicus brief addressing the question: "Whether a CLEC's switched access tariff, filed on a 'streamlined' basis pursuant to 47 U.S.C. § 204(a)(3), but subsequently found to violate the FCC's benchmark rule, can enjoy 'deemed lawful' status?"[31] The Commission answered "no," explaining that, under its regulatory regime for CLEC access services, "a carrier is *prohibited* from filing a tariff" in violation of the benchmark rule; "any attempt to do so would violate the FCC's rules," and such an unlawful tariff "cannot benefit from 'deemed lawful' status pursuant to section 204(a)(3) of the Act."[32]

*Third*, nothing in AT&T's Complaint requires the Commission to amend its rules or issue a new legislative rule, and thus there is no merit at all to GLCC's lengthy claim that AT&T is not entitled to damages or other retroactive relief. *See* GLCC Legal Analysis at 25-35. As described above, GLCC became obligated to offer a direct connect service in 2011, when the Commission amended its rules to require GLCC, as a carrier engaged in access stimulation, to benchmark its rates against CenturyLink's tariff, which provides a direct connect service. There is nothing unfairly retroactive about applying the Commission's longstanding functional equivalence rules to GLCC's misconduct.[33] Further, in 2008, the Commission made clear that CLECs should permit IXCs to install direct trunks to the CLEC's end office switch, and that precedent also can be applied to GLCC. As GLCC concedes, this is an adjudication, which "deals with what the

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[31] AT&T Ex. 98, FCC Amicus Br. at 2.

[32] *Id.* at 2, 25; *see* 47 C.F.R. § 61.26(b) (a CLEC "*shall not file* a tariff" for its access service that violates the benchmark rule) (emphasis added).

[33] *Northern Valley I* ¶¶ 7-8 (interpreting the functional equivalence standard's requirement that a CLEC serve end users to mean that it serve customers that pay a fee for a telecommunications service); *Northern Valley III*, 717 F.3d at 1019 ("[W]e conclude that the FCC reasonably interpreted and applied the relevant regulations. Moreover, nothing in the Communications Act precludes the FCC's approach in this case . . . .").

law *was*."[34] Having violated the Commission's existing rules, GLCC is liable for all damages, including consequential damages, that it caused as a result of its violations. *See* 47 U.S.C. § 206.

## II. GLCC'S FCPs PAID ONLY FOR SERVICES THAT ARE NOT "TELECOMMUNICATIONS SERVICE," AND THUS THEY ARE NOT "END USERS."

The first question in the District Court's *Second Referral Order* is whether GLCC is "properly charging 'end user' fees to their FCP customers for 'telecommunications services,' as required under the FCC's rules and GLCC's revised tariff."[35] In its answering submission, GLCC fails to address directly the fundamental question of whether **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** GLCC dodges this issue because those **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** services are plainly not telecommunications services under either the Act or GLCC's tariff, which means that GLCC's FCPs have not paid fees to GLCC for telecommunications services. Consequently, the answer to the District Court's question is "no."

Rather than directly address the question referred by the District Court, and attempt to show that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** *are* "telecommunications services" under the Act and its tariff, GLCC raises a host of arguments that have no merit, in an attempt to distract

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[34] GLCC Legal Analysis at 28 n.86 (quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988)) (emphasis altered) (internal quotations omitted).

[35] *GLCC-AT&T*, 2015 WL 3948764, at *9 (N.D. Iowa Jun. 29, 2015) ("*Second Referral Order*"). The Court referred this issue precisely because the Commission has expertise on questions about "[w]hat constitutes 'telecommunications services' within the Act." *Id.* at *6.; *see also id.* ("this question of how to classify particular services under the definition of 'telecommunications' in the Communications Act and GLCC's tariff is better suited for the FCC than a jury").

the Commission from the question that the District Court actually asked. Similarly deficient is GLCC's characterization of the requirement that the FCPs pay a fee for telecommunications service as "absurdist nitpicking." GLCC Legal Analysis at 46. That position, which traffic pumpers have raised as a defense since day one, was firmly rejected by the Commission in *Farmers*, *Northern Valley*, and a long line of other cases.

As Judge O'Brien explained in dismissing certain of GLCC's tariff claims in the underlying litigation, "the precise language of the tariff matters" because the filed tariff doctrine "binds carriers and customers to the terms stated." *GLCC-AT&T*, 2015 WL 12551192, at *21. Likewise, in the *Farmers* appeal,[36] Judge Tatel in oral argument explained why it was appropriate to require Farmers to comply strictly with end user tariff provisions when it engaged in access stimulation:

> "Well, it's just like the tax law. Right? ... . There's lots of loopholes and if you're going to exploit them, you better do them honestly, right?"[37]

In this case, the question is whether GLCC complied with a basic regulatory requirement to charge a fee for telecommunications services. The evidence clearly shows that it did not.

### A. [[BEGIN HIGHLY CONFIDENTIAL]] [redacted] [redacted] [[END HIGHLY CONFIDENTIAL]] Are Not "Telecommunications Services."

GLCC's tariff provides that an "End User must pay a fee to [GLCC] for telecommunications service." AT&T Ex. 8, GLCC FCC Tariff No. 2, Orig. Page 8. The record shows that, for nearly all of the traffic at issue, GLCC sent the FCPs invoices setting forth **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

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[36] *Qwest Commc'ns Corp.* v. *Farmers & Merchs. Mut. Tel. Co.*, 24 FCC Rcd. 14801 (2009) ("*Farmers I*"), *recon. denied*, 25 FCC Rcd. 3422 (2010) ("*Farmers II*"), *aff'd*, 668 F.3d 714 (D.C. Cir. 2011) ("*Farmers III*").

[37] AT&T Ex. 100, Tr. of Oral Arg., *Farmers v. FCC*, 668 F.3d 714, (D.C. Cir. 2011), at 45-46 (Dec. 7, 2011).

[redacted] **[[END HIGHLY CONFIDENTIAL]]** None of these services entail the transmission of information between points of a customer's choosing. Indeed, GLCC has conceded as much.[39] Consequently, they are not telecommunications services as defined by the Act and by GLCC's tariff, which necessarily means that, in paying GLCC's invoices, the FCPs did not pay a fee for "telecommunications service."[40]

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[38] Compl. ¶ 44. **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

[39] **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** In its answering submission, GLCC filed a declaration of its CEO, Joshua Nelson, in which Mr. Nelson attempts to explain away his admission by asserting that he "simply did not understand" the questions asked at his deposition. Nelson Decl. ¶ 21. The Commission should give no weight to this after-the-fact change in position. In all events, and regardless of Mr. Nelson's testimony, as noted above, GLCC's Answer admits (or at least fails to deny) that each of the **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** services, in and of itself, is not a telecommunications service.

[40] Compl. ¶¶ 74-81; AT&T Legal Analysis at 25-27; *see also Sprint Commc'ns. Co.* v. *Crow Creek Sioux Tribal Court*, No. 10-04110, 2016 WL 4150931, at *8 (D.S.D. Aug. 4, 2016) ("NAT's method of determining the number of ports/lines that it bills to Free Conferencing is in derogation of NAT's tariffs and the service agreements. The fact that NAT billed Free Conferencing *something* and gave that *something* an 'End User Fees' façade for billing purposes does not demonstrate that Free Conferencing actually subscribed to the End User Access Service").

### B. The FCPs Unambiguously Were Billed And Paid Fees For [[BEGIN HIGHLY CONFIDENTIAL]] [redacted] [[END HIGHLY CONFIDENTIAL]], Not For GLCC's Completion Of Calls.

GLCC argues that, because the calls were completed by GLCC and reached the FCPs' equipment, the payments GLCC received from the FCPs were necessarily payments for completing the calls to the FCPs and thus for a telecommunications service. *E.g.*, GLCC Legal Analysis at 42, 44. This argument fails, first as a matter of common sense, and also because the record evidence does not support GLCC's claim that the fees paid by the FCPs were for completing calls. Rather, the payments were unambiguously for the services **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted]

[redacted]

[redacted] **[[END HIGHLY CONFIDENTIAL]]** Accordingly, GLCC failed to comply with the explicit requirement that its FCPs must "pay a fee to [GLCC] for telecommunications service."

GLCC's other arguments fare no better. The Commission has rejected the suggestion that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

Finally, GLCC's assertion that "the Commission does not regulate the relationship between a CLEC and its customers," GLCC Legal Analysis at 40, is a red herring. Whether GLCC elects to charge the FCPs a fee or not is within its discretion. What is not within its discretion is its ability to collect tariffed access charges from AT&T if the FCPs do not pay fees for telecommunications service. Both the Act and GLCC's tariff require that such fees be charged and collected, and GLCC's argument that such a requirement impermissibly invades the

[41] AT&T Legal Analysis at 31 (citing *Qwest Commc'ns Corp.* v. *Sancom, Inc.*, 28 FCC Rcd. 1982, ¶¶ 24-25 (2013).

relationship between CLEC and end user has been expressly rejected by the D.C. Circuit.[42]

### C. GLCC's Claims Are Inconsistent With *Metrocall.*

In its *Metrocall* decision, the Commission concluded, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** Under *Metrocall*, if a particular service is provided and a payment is made, the payment cannot be deemed to relate to that service unless the terms of the invoices and agreements support that conclusion.

**[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[42] In upholding the Commission's decision in *Northern Valley II*, the D.C. Circuit held as follows: "Northern Valley points out that the FCC has previously refrained from directly regulating the relationship between the CLEC and the end user. But the flaw in that argument is that the FCC is not here regulating the relationship between the CLEC and the end user; rather, the FCC is regulating the relationship between the CLEC and the long-distance carrier." *Northern Valley III*, 717 F.3d at 1019.

[redacted] **[[END HIGHLY CONFIDENTIAL]]**, the logic of *Metrocall* compels rejection of GLCC's position.[43]

In seeking to distinguish *Metrocall*, GLCC focuses on "the [Commission's] prohibition against recurring charges solely for numbers assessed *from one carrier to another*," which GLCC asserts "has no bearing here." GLCC Legal Analysis at 43 n.135. But GLCC ignores the other holding in *Metrocall*, which is the one relevant here, wherein the Commission established that a carrier's invoices and the governing legal instrument (in *Metrocall*, a tariff; here, the TSAs) are the relevant evidence to examine in determining what services are being billed and paid.[44] In so holding, the Commission rejected the very position that GLCC is taking in this

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[43] *See also Crow Creek*, 2016 WL 4150931, at *10 (rejecting argument that $6.45 rate was "all-inclusive" and encompassed specified services given "the absence of any agreement" to that effect); *id.* at *15 (concluding free calling party did not receive service under LEC's tariff "because NAT did not calculate or bill Free Conferencing for the local exchange service described in § 5.2 of NAT's Tribal tariff. NAT's theory ignores the explicit requirements of its tariffs and contracts and relies, instead, on unwritten and unverifiable amendments to those documents"). In other words, because the record shows only billing and payment for the **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** non-telecommunications services, there is no evidence that can support the conclusion that the FCPs were also billed and paid for an additional service.

[44] GLCC tries to counter this conclusion with an analogy to postal service, claiming that "by AT&T's absurd logic, buying a 'stamp' gets you only paper and glue, not the transmission of your letter." GLCC Legal Analysis at 44. The analogy is inapt. **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**, by contrast, are analogous to a street address, which serves as the destination for the transmission of a letter, not the transmission itself.

case.[45] Under *Metrocall*, if a carrier sends bills that refer only to specified services, then there is no basis to conclude (as GLCC argues here) that the carrier was in fact billing for other services not identified in the bills.[46]

### D. [[BEGIN HIGHLY CONFIDENTIAL]] [redacted] [[END HIGHLY CONFIDENTIAL]]

GLCC relies on **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[45] **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

[46] GLCC also claims that *Metrocall* demands a "complete record," GLCC Legal Analysis at 43-44, n.135, but the Commission has a complete record here, including the invoices, underlying agreements and testimony, which goes well beyond merely "the names of the various fee categories on the TSA Exhibit[s]" GLCC Legal Analysis at 43-44, n.135.

[redacted] **[[END HIGHLY CONFIDENTIAL]]**

**E. GLCC's Assertion That Its <u>Invoices And Agreements</u> For [[BEGIN HIGHLY CONFIDENTIAL]] [redacted] [[END HIGHLY CONFIDENTIAL]] Were A Means To "Size" Fees For A Telecommunications Service Has No Valid Support Or Credibility.**

GLCC contends that it "calculate[d] the fee for its telecommunications service based on certain key metrics that reflect the quantity of those services it provides to its various customers." GLCC Legal Analysis at 44. That position is neither supported nor credible.

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[47] As GLCC's corporate representative expressly acknowledged, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

Nothing in the text of the invoices or the TSAs, or any other contemporaneous documents, suggests that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** AT&T highlighted that point in its Legal Analysis, and GLCC failed to identify any contemporaneous evidence rebutting AT&T's position. To the contrary, GLCC relies upon Mr. Nelson's declaration, prepared for this proceeding, which is nothing more than a blatant attempt to manufacture support for its position after the fact. Indeed, Mr. Nelson made no mention of the "sizing" concept at his deposition. Consequently GLCC's sizing argument should be rejected as an after-the-fact, purely litigation construct.[48]

What is more, the **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

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[48] *See Crow Creek*, 2016 WL 4150931, at *10 (rejecting party's position as a "post hoc rationalization").

[49] **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

### F. GLCC's Argument That The FCPs Need Not Pay A Fee For Interstate Services Lacks Merit.

GLCC effectively admits that it did not receive fees for any interstate telecommunications services, Reply to Ans. ¶ 48, but argues that payment of interstate fees is not required by its tariff. Under GLCC's view, its tariff should be interpreted so that an End User/Customer need only send or receive an interstate telecommunications service, and the interstate service can be free, so long as the Customer pays GLCC a fee for intrastate telecommunications service outside of the tariff, pursuant to some separate agreement. GLCC Legal Analysis at 35-43. That position is not only illogical, it is not consistent with the definitions in GLCC's tariff.[50]

GLCC's tariff defines "End User" as "any Customer of an Interstate or Foreign Telecommunications Service that is not a carrier." Compl. ¶ 37. The tariff also defines the phrase "Customer of an Interstate or Foreign Telecommunications Service" in relevant part as any entity that "sends or receives an interstate or foreign Telecommunications service" so long as the entity pays "a fee to [GLCC] for telecommunications service." *Id.* In other words, the "fee ... for telecommunications service" that must be paid is assessed on the "interstate ... Telecommunications service" that the End User/Customer must send or receive.

Because these two phrases appear in the same sentence and in the same tariff, it is thus reasonable to read this language to require that the Customer pay a fee for the interstate

[50] As to the Commission's rules, in the *Northern Valley* decision, the Commission held that CLECs, like ILECs, had to charge a fee, and the ILEC fees to which the Commission pointed were the ILECs' *interstate* end user common line charges. *Northern Valley I* ¶ 5, n.16 (referencing 47 C.F.R. §§ 69.4(a), 69.104, 69.152). Further, it would be unusual for the Commission to hold that, in order for a LEC to file a valid tariff for *inter*state access services, a CLEC needs to charge a fee for *intra*state telecommunications service. As such, it is reasonable to read *Northern Valley I* as requiring the payment of fee for an interstate telecommunications service. The Commission need not address the scope of its rules, because GLCC's tariff is properly read to require payment of a fee for interstate telecommunications service.

telecommunications service that it sends or receives. Moreover, even if GLCC's interpretation of its tariff were as reasonable as AT&T's reading (which it is not), AT&T should prevail, because ambiguities in GLCC's tariff are construed in AT&T's favor and against GLCC. *See AT&T Corp.* v. *Alpine Commc'ns*, 27 FCC Rcd. 11511, ¶ 27 (2012).

## III. GLCC IS BARRED FROM PURSUING ALTERNATIVE STATE-LAW REMEDIES BECAUSE IT FILED A TARIFF PURSUANT TO THE COMMISSION'S REGULATORY REGIME.

The Commission's regulations governing interstate access services exclude state-law theories of recovery, particularly where, as here, the CLEC has chosen to file a tariff for such services. *See* AT&T Legal Analysis at 33-50. GLCC asserts that the Commission explicitly "has authorized" state law recovery for CLEC access services. GLCC Legal Analysis at 47. Not only is GLCC's argument unsupported by any valid precedent, but it is premised on an entirely upside-down and incoherent view of the Commission's regulatory regime.

### A. The Commission Regulates CLEC Access Charges According To A Federal Regime; It Has Not De-Regulated Access Charges In Favor Of State Regulation.

GLCC reads the Commission's use of the word "deregulatory" in the Commission's 2001 and 2004 orders, GLCC Legal Analysis at 47, to eliminate the Commission's clear descriptions in those orders of the problems that it sought to address, and the "new regulatory regime" that it adopted to address those problems, *Eighth Report and Order* ¶ 1. Based on this faulty premise, GLCC claims that the Commission's reforms do not constrain CLECs, but rather permit them to pursue recovery for interstate access services on whatever state-law theories a CLEC can imagine. GLCC has it entirely backward.

From 1996 to 2001, "CLECs [were] largely unregulated in the manner that they set their access rates." *CLEC Access Order* ¶ 21; *accord id.* ¶¶ 8, 13, 25. A CLEC could be subject to a complaint that its rates were unjust and unreasonable under Section 201(b),[51] but prior to 2001, "the Commission refrained from involving itself in a general examination of the reasonableness of CLEC access rates." *CLEC Access Order* ¶ 25. In 2001, after finding that CLEC access rates were generally priced "well above" the access rates of the incumbent, *id.* ¶ 22, the Commission concluded that its prior "regime ha[d] often failed to keep CLEC rates within a zone of reasonableness." *Id.* ¶ 25.

To address this problem, the Commission did not, as GLCC contends, "de-regulate" CLEC access rates. To the contrary, it imposed additional regulation on CLECs' rates noting, that such "*action* is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services."[52] Specifically, the Commission provided two methods for a CLEC to recover switched access charges: either "negotiate" an agreement with an IXC, or file a lawful tariff that complies with the Commission's benchmark rule. *CLEC Access Order* ¶¶ 3, 82-87. The Commission thus constrained the CLEC's bottleneck monopoly power, by "*eliminat[ing] regulatory arbitrage opportunities* that previously existed" under the pre-2001 regime, in which CLECs could "*use[] the tariff system* to set access rates that were [not] subject . . . to negotiation." *Id.* ¶¶ 2-3 (emphases added).

That the Commission allowed CLECs the option of negotiating contracts with IXCs does not mean, as GLCC argues, that the Commission permitted CLECs to pursue equitable theories of recovery, under state law, in the absence of a negotiated contract. Nothing in the Commission's decisions supports such an interpretation, nor can such an interpretation be

[51] *See, e.g.*, *AT&T Corp.* v. *Bus. Telecom, Inc.*, 16 FCC Rcd. 12312, ¶ 1 (2001) (granting claim that access rates were unjust and unreasonable under Section 201(b)).

[52] *Id.* ¶ 34 (emphasis added); *see* 47 C.F.R. § 61.26 (new rule issued in 2001 to regulate CLECs); *see also* AT&T Ex. 98, FCC Amicus Br. at 5-6 (explaining that CLECs "were largely unregulated in the manner in which they set their access rates *until 2001*, when the FCC adopted the [*CLEC Access Order*].") (quotation omitted) (emphasis added).

reconciled with the regime that the Commission established. The extent to which a CLEC that has negotiated a contract with an IXC can rely on state-law theories to construe or interpret that contract is simply not at issue here, and that issue was not referred by the District Court. It is indisputable that GLCC elected to file a tariff for its access services; it did not negotiate a contract with AT&T. Thus, under the Commission's regime, GLCC's only method for recovery is by its tariff.[53] If it fails to recover under its tariff, it cannot enter some alternative reality, and seek to pursue additional state-law recovery methods that are not authorized by, and indeed would eviscerate, the Commission's regime.

The Commission's decision in the *All American Damages Order* further confirms this point. In that decision, the Commission explained that, when a carrier violates its tariff or the Commission's rules in providing access services, there is no "regulatory gap" that allows it to pursue "alternate damage theories," because carriers "cannot avoid the Commission's regulation

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[53] GLCC's reliance on *Ting* v. *AT&T*, 319 F.3d 1126 (9th Cir. 2003) is misplaced, because that case involved long distance services. Unlike CLEC access services, the Commission has chosen to institute mandatory detariffing for long distance, although such services remain subject to Sections 201 and 202 of the Act. Under that regime, the courts of appeal have split on the effect of mandatory detariffing on certain state law claims. Although the Ninth Circuit in *Ting* declined to find pre-emption of certain state laws allegedly limiting the use of arbitration clauses, it is the only circuit to reach that result. GLCC fails to cite decisions from the Seventh and Tenth Circuits, which found that similar state laws (as well as state-law unjust enrichment claims) were pre-empted because they were inconsistent with Sections 201 and 202. *See Boomer* v. *AT&T Corp.*, 309 F.3d 404, 420 (7th Cir. 2002) ("[I]t is clear from Section 201(b) that Congress intended federal law to govern the validity of the rates, terms and conditions of long-distance service contracts."); *In re Universal Service Fund Tel. Billing Practice Litig.*, 619 F.3d 1188, 1197-99 (10th Cir. 2010) (same); *Dreamscape Design, Inc.* v. *Affinity Network, Inc.*, 414 F.3d 665, 674 (7th Cir. 2005) (same). Because the Commission's regime for CLEC access charges is different, and requires CLECs either to file tariffs or to negotiate contracts, nothing in this case requires the Commission to address the cases on the long distance regime.

of competitive interstate switched access services by violating the very rules the Commission created to govern those services."[54]

The Commission's adoption, in 2011, of a "uniform, national" framework for all intercarrier compensation, including inter- and intra-state access, further undercuts GLCC's position on its alternative state law claims. *See* AT&T Legal Analysis at 34 n.137. Remarkably, in its Answer, GLCC concedes that, under the Commission's 2011 regime, "*the FCC has preempted state control* over the rates for intrastate access," and it asserts that state regulation of intrastate access stimulation (such as rules issued by the IUB) has been "nullified." Ans. ¶ 28 (emphasis added). GLCC's position in this proceeding is thus incoherent: under its view of the Commission's regulatory regime, state control of *intra*state access has been nullified, but states can control rates for *inter*state access through alternative state-law claims like those pled by GLCC. This is wrong, and what has been clearly "nullified" are GLCC's *quantum meruit* and unjust enrichment claims.

Finally, GLCC's argument that "it would make little sense for the FCC to countenance state-law-governed negotiated contracts, but then (silently) amend all 50 states' statutes of fraud to include a new category of contract that must be in writing and signed by the party against whom it is sought to be enforced, and to preclude equitable modes of recovery designed to ensure just results when parties fail to reach a signed, written agreement," GLCC Legal Analysis at 51, is wholly devoid of merit. The Commission's regime is entirely sensible, and GLCC's

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[54] *AT&T Corp.* v. *All Am. Tel. Co.*, 30 FCC Rcd. 8958, ¶ 13 & n.50 (2015) ("*All American Damages Order*"), *review pending*, No. 15-1354 (D.C. Cir.).

explanation turns logic on its head.[55] A negotiated contract for access, *i.e.*, one that is "mutually agreed upon" between an IXC and a CLEC, is consistent with Section 201(b) and the Commission's regime, because it limits the CLEC's ability to abuse its bottleneck monopoly by allowing the IXC to decline to agree to unreasonable terms. *CLEC Access Order* ¶¶ 4, 108. GLCC's proposed construct provides no such assurances. In fact, it would allow the laws of each of the 50 states (and juries in individual cases) to effectively set rates and terms for interstate access services, with no assurance that those determinations comply with the Commission's view of what is just and reasonable under Section 201(b).

### B. GLCC Ignores Or Mischaracterizes Substantial Caselaw Finding That CLECs Cannot Pursue *Quantum Meruit* or Unjust Enrichment Claims.

GLCC dismisses out-of-hand the vast majority of courts that have considered and rejected the argument that it advances here. *See* GLCC Legal Analysis at 53. GLCC claims without elaboration that those decisions – which it tellingly refuses to discuss individually – "mechanically" applied the law or were incorrect in light of GLCC's unsupported view that the Commission "clearly established . . . a regime that contemplates state-law-based modes of recovery." *Id.* As the District Court held in granting AT&T's motion for summary judgment:

> "It defies credulity that the LECs continue to maintain, despite consideration of these very traffic pumping cases by various tribunals, that the resounding theme at the very core of the matter **– if the tariff access charges do not apply, are the LECs nonetheless entitled to some compensation –** has somehow been missed by all those tribunals. It has not; **the answer is no**."[56]

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[55] Contrary to GLCC's claim, the Commission did not implicitly "amend" state statutes of frauds, but rather explained, pursuant to its exclusive jurisdiction, which kinds of contracts for interstate access services comply with the regime that it promulgated to ensure that CLEC rates are just and reasonable.

[56] *GLCC-AT&T*, 2015 WL 12551192, at *23 (quoting *Qwest Commc'ns Co.* v. *Aventure Commc'ns Tech., LLC*, No. 07-00078, 2015 WL 711154, at *81 (S.D. Iowa 2015)).

Moreover, Judge O'Brien's holding in this regard is hardly unique.[57] Indeed, the court in *AT&T* v. *Aventure* recently reached a similar conclusion in granting AT&T judgment on the pleadings with respect to a LEC's alternative claims of *quantum meruit* and unjust enrichment. The court reasoned that the alternative claims "*allege the very same access services* for which Aventure billed AT&T *under its tariff*. Since Aventure alleges that it has filed interstate access services tariffs, the only way Aventure can recover from AT&T is via tariff." *AT&T* v. *Aventure*, 2016 WL 5340680, at *59 (first emphasis added). In so ruling, the court rejected Aventure's attempt to distinguish the Commission's *Northern Valley* orders, in which the Commission "held that . . . CLECs can only recover for access services through tariffs or negotiated contracts," *id.* at *58, because "[a]ny doubt regarding the LECs ability to recovery for services provided to IXCs in the access stimulation cases . . . has been removed by the FCC's [*All American Damages Order*]," *id.* at *59.

There is also no merit to GLCC's claim that "courts that have foreclosed a LEC's ability to recover under state law have done so only *after* it was established that the carrier had a viable, alternative basis for compensation under the federal regulatory regime." GLCC Legal Analysis at 52. Not only does GLCC ignore at least 17 decisions that are explicitly or implicitly to the contrary – including those that AT&T cited in its Legal Analysis, and the decision in *AT&T* v. *Aventure* that issued after GLCC's Answer – GLCC mischaracterizes the only authority that

[57] GLCC incorrectly claims that Judge Bennett has "strongly suggested" that he does not agree with Judge O'Brien's summary judgment decision. GLCC Legal Analysis at 47 n.149. Rather, Judge Bennett referred GLCC's issues because other courts had referred similar issues. Since Judge Bennett's referral order, the Commission issued its *All American Damages Order*, which has removed any doubt regarding whether CLECs can pursue alternative recoveries for access services they purported to provide by filed tariff. *See AT&T Corp.* v. *Aventure Commc'ns Tech., LLC*, No. 07-00043, 2016 WL 5340680, at **58-59 (S.D. Iowa Sept. 19, 2016) ("*AT&T* v. *Aventure*").

GLCC presents for this position. In *INS* v. *Qwest IV*,[58] the Eighth Circuit affirmed an order dismissing claims of implied contract and unjust enrichment – but not because the court had first determined that the claimant would be compensated. Rather, the court determined that because the reciprocal compensation agreement contemplated by the IUB order at issue in the case was a form of "express contract," which precluded alternative equitable claims for the same traffic as a matter of Iowa law.[59] GLCC's characterization of *INS* v. *Qwest IV* is particularly untenable in light of the decision in *AT&T* v. *Aventure*, in which Judge Gritzner cited his decision in *INS* v. *Qwest III*, as well as his decision in *INS* v. *Qwest IV*, yet reached the exact opposite conclusion that GLCC claims is compelled by those cases.

GLCC also incorrectly characterizes the two decisions it cites in support of its claim that "numerous decisions . . . discredit AT&T's arguments." GLCC Legal Analysis at 51. In the first decision, Judge Kornmann initially declined to dismiss a CLEC's unjust enrichment claim, but then stayed the case and referred to the Commission, among other issues, whether the CLEC could be compensated at all for access services that were not provided consistent with the terms of its tariff.[60] The second decision was based on the incorrect premise, which the Court drew at the pleadings stage, that a CLEC's services fall entirely outside of the Commission's regulatory

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[58] *Iowa Network Servs., Inc.* v. *Qwest Commc'ns Corp.*, 466 F.3d 1091 (8th Cir. 2006) ("*INS* v. *Qwest IV*"), *aff'g* 385 F. Supp. 2d 850 (S.D. Iowa 2005) ("*INS* v. *Qwest III*").

[59] *INS* v. *Qwest IV*, 466 F.3d at 1098 ("[T]he regulatory process [as determined by the IUB order] contemplates that an express contract will ultimately result, and for this reason the district court did not err in dismissing INS's state law claims of unjust enrichment and implied contract.").

[60] *See N. Valley Commc'ns* v. *Qwest Commc'ns Corp.*, 659 F. Supp. 2d 1062, 1070 (D.S.D. 2009) (reasoning that filed rate doctrine did not apply), *staying case and referring issues*, 2010 WL 3909932, at *5 (Sept. 29, 2010), *denying mot. to vacate stay*, 2012 WL 2366236, at *6 (Jun. 20, 2012) ("It is within the unique competence of the FCC to determine what compensation, if any, plaintiff may receive for these access stimulation-related fees . . . .").

regime if the CLEC provides them in violation of that regime.[61] The Commission has since conclusively rejected that premise (to the extent that it was ever valid) in the *All American Damages Order*, ¶ 13 & n.50.

Finally, GLCC tries to diminish its own prior advocacy to the Commission, in which it took a position directly contrary to the one that it advances here. In a petition for declaratory ruling, GLCC urged the Commission to pre-empt the IUB, when GLCC feared that the IUB would regulate GLCC's interstate access services. Specifically, GLCC urged the Commission to declare that "all matters relating to interstate access charges, including the rates therefor and revenue derived therefrom, are within its exclusive federal jurisdiction and thus any attempts by state authorities to regulate interstate access charges are beyond their authority."[62] In GLCC's view, as espoused in 2009, state utility commissions had no authority even to "touch[] . . . the interstate access rates and revenues of LECs." *Id.* at 2. That position stands in stark contrast to GLCC's current position that "juries . . . [should] decide the 'reasonable value' for services provided'" pursuant to alternative state-law claims. GLCC Legal Analysis at 56-57. GLCC does not and cannot offer any valid justification for this complete reversal of position.[63]

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[61] *See* AT&T Ex. 85, Order Denying Mot. for J. on Pleadings, *N. Valley Commc'ns, LLC* v. *AT&T Corp.*, No. 14-01018, at **11-12 (D.S.D. Aug. 20, 2015) (reasoning that "if [the] services are not access services, then they not only fall outside the tariff . . . but also fall outside the scope of the FCC rule limiting the methods by which a CLEC may charge.").

[62] AT&T Ex. 70, Pet. for Decl. Ruling to the Iowa Utils. Bd. & Contingent Pet. for Preemption, WC Docket No. 09-152, at *1 (filed Aug. 14, 2009); *accord id.* at 14.

[63] In a footnote, GLCC tries to claim that its petition "dealt with an entirely different factual and legal landscape." GLCC Legal Analysis at 50 n.160. However, GLCC points to no actual changes in the law or in the material facts. Indeed, three pages earlier in its Legal Analysis, GLCC describes the current regime as dating to 2001—several years before it filed its petition seeking preemption of state regulation of interstate access services. *See id.* at 47 (citing *CLEC Access Order*).

### C. *New Valley* Is Inapposite.

GLCC argues that the Commission's decision in *New Valley* requires that the Commission permit state common-law recoveries for access services.[64] *New Valley* is inapposite for several reasons. *First*, in that decision, the Commission exercised its discretion to decline to award a refund to a party that, despite being warned that it bore the burden of proof, "provide[d] no evidence or persuasive arguments in support of its claim." *New Valley* ¶ 9. *Second*, the Commission did not affirmatively award any compensation to any party, nor did it identify any theory that would justify such an award – the Commission certainly did not discuss or, as GLCC claims, "authorize"[65] alternative state common law claims. *Third*, the services at issue in that case were special access services, and the Commission has explained in the context of CLEC access services that *New Valley* and its progeny "do[] not hold that a carrier is *always* entitled to some compensation for a service rendered, even if the service is not specified in its tariff," but rather that "a carrier *may be* entitled to some compensation for providing a non-tariffed service, depending on the totality of the circumstances."[66] *Finally*, even if the Commission were to develop a theory that would permit a CLEC to recover for access services that it provided in violation of the Commission's rules and the CLEC's filed tariff, the Commission has never remotely implied that the varied common-law doctrines of 50 states provide appropriate vehicle for such a recovery.

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[64] *See* GLCC Legal Analysis at 55 (citing *New Valley Corp.* v. *Pacific Bell*, 8 FCC Rcd. 8126, ¶ 8 (1993) ("*New Valley*")).

[65] *Id.* at 47.

**[66]** *In re All American*, 26 FCC Rcd. 723, ¶ 19 (2011) (citing *Farmers I* ¶ 24 n.96).

### D. The Commission Need Not Address Any "Reasonable Rate" In This Proceeding, But If It Does, It Could Never Exceed $0.0007 For End Office Switching.

AT&T agrees with GLCC that the issue that the Commission Staff labeled as issue 5 concerns damages, and thus only needs to be considered if GLCC is entitled to compensation for end-office switching services that it provided in violation of its tariff and the Commission's rules. AT&T's position is that, if there is no tariff, then there is no right to compensation.[67]

In the event, however, the Commission were to reach this issue, there would be no circumstances in which GLCC could collect more than $0.0007 per MOU for "service" that it allegedly provided. *First*, $0.0007 is the rate that GLCC offered to terminate substantively identical intrastate access traffic.[68]

*Second*, some parties (including AT&T) suggested using $0.0007 in the *Connect America* proceeding, because it was a "negotiated rate," albeit for reciprocal compensation. *Connect America Order* ¶ 692. While the Commission declined to adopt $0.0007 as the benchmark rate for all access-stimulating LECs, it did so in part because, at that time in 2011, it "expect[ed] that the approach we adopt will reduce the effects of access stimulation significantly." *Id.* GLCC, of course, did not curtail its access stimulation. *See also id.* ¶ 690.

*Third*, $0.0007 is the current rate, and one used by the Commission in its transition (thus undercutting the argument that $0.0007 has no utility in the access context). *See id.* ¶ 801, Fig. 9. *Finally*, $0.0007 reflects a generous rate for GLCC's service, in light of the fact that GLCC terminates many times the traffic of CenturyLink, with far fewer facilities.[69]

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[67] *See, e.g., AT&T Corp.* v. *YMAX Commc'ns Corp.*, 26 FCC Rcd. 5742, ¶¶ 12-14 (2011) (carrier violated Section 203(c) of the Act by billing access charges that were not authorized by tariff that it had filed).

[68] *See* AT&T Ex. 13, Toof Report, Ex. DIT-5, at 1.

[69] Compl. ¶¶ 53-54.

## IV. CONCLUSION

For the foregoing reasons, the Commission should grant the relief requested in AT&T's Formal Complaint.

Respectfully submitted,

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Dated: October 6, 2016

*Counsel for AT&T Corp.*

# Exhibit 67

## Declaration of Peter D. Copeland
## (dated May 1, 2007)

DOCKET FILE COPY ORIGINAL

07-135

FILED/ACCEPTED

NOV 30 2007

Federal Communications Commission
Office of the Secretary

Before the
Federal Communications Commission
Washington, DC 20554

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| In the Matter of | ) | |
| | ) | |
| Qwest Communications Corporation, | ) | File No. EB-07-MD-_____ |
| | ) | |
| Complainant | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| Farmers and Merchants Mutual Telephone Company, | ) | |
| | ) | |
| Defendant | ) | |
| | ) | |

**DECLARATION OF PETER B. COPELAND**

1. My name is Peter B. Copeland. My business address is 1801 California St. 47th floor, Denver, Colorado 80202. My current position is Director, Cost and Economic Analysis, in the Public Policy organization of Qwest Communications Corp. ("Qwest"). In this position, I supervise the development of all forward-looking regulatory cost studies for Qwest. In addition to my experience in developing wholesale and retail cost studies, I have also had responsibility for the development of models of the local exchange network, universal service advocacy, and materials relating to jurisdictional separations and rate development. This declaration is prepared in support of the above-captioned formal complaint by Qwest against Farmers and Merchants Mutual Telephone Company ("Farmers"). I make the statements in this declaration based

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upon my personal knowledge and my review of Qwest records maintained in the ordinary course of business and prepared in anticipation of this litigation.

2. The purpose of this Declaration is to address the costs that Farmers has – or has not – likely incurred as its traffic volumes have increased dramatically. *See generally* Declaration of Lisa Hensley Eckert ("Hensley Eckert Decl."). Specifically, I explain below why, when Farmers's traffic volumes increased without any concomitant increase in the number of access lines it served, it is almost certain that its costs rose at a much slower rate than did its traffic figures.

3. First, I describe generally why an increase in traffic would not, on its own, cause a proportional increase in costs. Then, I show how the Federal Communications Commission ("Commission" or "FCC") has already recognized this principle, in approving average-schedule settlement formulae for use by the National Exchange Carrier Association. These formulae recognize that when traffic volumes grow to the extent Farmers's volumes have grown, in isolation of related access line count growth, volume growth is likely to outpace growth in costs by a ratio of almost 7 to 1.

4. In short, this Declaration shows that when Farmers billed Qwest and other IXCs for terminating access under its existing tariff for increasing volumes of what it classified as terminating access, *see* Hensley Eckert Decl. at ¶ 14, those bills almost surely reflected figures exceeding its related costs many times over – and therefore well above Farmers's authorized rate of return.[1]

[1] I assume for purposes of Count I of Qwest's complaint that the traffic at issue here "terminates" in Farmers's exchange. References in this declaration to "termination" do not reflect the view that this term properly characterizes all traffic delivered by Qwest, directly or indirectly, to Farmers.

## I. MOU Growth Alone Does Not Lead to Proportional Growth in a Carrier's Terminating Access Costs.

5. Although the Farmers's charges at issue in Qwest's Complaint are referred to generally as being "traffic sensitive," and are applied on a per-minute of use ("MOU") basis, the cost that these charges are designed to recoup do *not* rise in proportion to MOU growth. Those costs relate to two specific aspects of Farmers's network: its end office switch, and the trunks from that end office switch to the tandem switch.[2] I address these in turn.

### a. Farmers's End-Office Switching Costs Have Not Risen in Proportion to its Increased Traffic Volumes.

6. The traffic-sensitive costs incurred by use of an end-office switch can be broken down into two categories: (1) costs relating to the "line side" of the switch (*i.e.*, those costs associated with delivery of traffic from end-office trunk ports connected to the tandem switch to the called party, when such traffic is delivered to the called party over switched common lines) and (2) costs relating to "trunk side" of the switch (*i.e.*, those costs associated with receipt of traffic sent to the end-office switch from a tandem switch). For reasons described below, these costs almost surely have not risen in proportion to Farmers's increased traffic figures.

7. ***Line-Side End-Office Switching Costs.*** An end-office switch is equipped with line-side switch ports used to connect individual access lines to the switch. In simple terms, each access line is associated with a single line-side switch port. Line-side costs therefore will rise when a carrier is required to install new line-side switch ports. An increase in the number of MOUs transiting the switch will not, however, result in any increase in line-side costs if that increase is not tied to any significant increase in access

[2] The tandem switch itself is not owned by Farmers, and thus is not included in this analysis.

line usage. This is so because the line-side switch ports that switch manufacturers sell to LECs are engineered with sufficient capacity to support any reasonable increase in usage that may be delivered to those access lines during the life of the switch. Here, Farmers's line counts have not increased: Based on filings made with the Universal Service Administrative Company ("USAC"), Farmers used 833 access lines in the fourth quarter of 2004, 862 lines in the fourth quarter of 2005, and 805 access lines in the fourth quarter of 2006. Farmers has projected, moreover, that it will have only 785 access lines in the second quarter of 2007. Thus, it appears that the tremendous expansion in Farmers traffic described in the Hensley Eckert Declaration was not attended by a similar increase in access line counts.[3] Thus, line-side end-office switching costs are not affected by the huge increase in MOUs that are being received by Farmers's switch and handed off to the FSPs.

8. ***Trunk-Side End-Office Switching Costs.*** An end-office switch is also equipped with trunk-side switch ports generally used to connect the end-office switch to other switches (typically tandem switches). As with line-side switch ports, trunk-side switch ports are sold with all the related traffic capacity components necessary to support any level of usage associated with a given trunk. Thus, the increased trunk-side costs associated with increased traffic arise solely as a result of any increase in the number of necessary trunk-side switch ports.

9. The data presented below demonstrate that the cost that the typical Bell Operating Company ("BOC") incurs to add trunk-side ports is about $0.00072 per

[3] The absence of significant access-line growth in the presence of such significant demand growth indicates that the traffic at issue here was directed not over access lines at all, but rather over DS1 or ISDN PRI trunks, or other similar facilities, purchased separately from Farmers. Traffic delivered using such facilities would never touch the line side of the switch, but instead would be connected to the switch through trunk-side ports.

minute. The methodology I used to make this calculation was as follows. First, based on BOC cost figures, I assumed a per-trunk port investment, fully loaded with installation costs, sales tax, power and interest during construction, of $197 per trunk. I multiplied this figure by a 0.0329 cost factor[4] to derive a monthly cost per trunk of $6.48. I then divided that cost by 9000 MOUs – a common trunk-usage assumption – to derive a per-MOU cost of $0.00072. These calculations are set forth below.

| **Estimated Cost per MOU for Trunk** | |
|---|---|
| Loaded Investment per DS0 Trunk for BOC | $ 197 |
| Monthly TELRIC+Common Cost Factor to convert investment to monthly cost | 0.0329 |
| Monthly Cost per DS0 Trunk | $6.48 |
| MOUs per Month per Trunk based on common industry trunk usage standard | 9,000 |
| Cost per MOU for BOC Trunk | $0.00072 |
| | vs. |
| Farmers's Tariff Rate for Local Switching | $0.02532 |

Thus, for a BOC, additional trunk capacity would cost at most approximately $0.00072 per additional minute. In contrast, however, Farmers's tariff included a charge of $0.025320 per MOU for the provision of end-office ("local") switching functions. *See* Hensley Eckert Decl. at Ex. 9. Thus, Farmers's end-office switching charges recover more than *35 times* the typical BOC's additional cost. While it is reasonable to assume

[4] Cost factors of this sort are designed to convert investment into monthly capital expenses (including allowances for depreciation, cost of money, and income taxes), maintenance expense, and other support and common costs permitted by the FCC's TELRIC rules. The factor used here formed, in part, the basis for the Qwest UNE rates that the Commission found to be TELRIC-compliant in approving the company's section 271 application to provide long-distance service in Iowa. Specifically, the factor was used in deriving Qwest's Colorado TELRIC rates, which were then used as the basis for "benchmarking" Iowa rates. This figure is actually higher than Qwest's data suggest is appropriate, but the presumption works in Farmers's favor here, because it reduces the disparity between the cost derived in the chart and the rate set forth in Farmers's tariff. Put differently, use of a more realistic cost factor here would show that Farmers's rate is even more drastically above its likely trunk-side switch port cost than is indicated in the chart.

that a small LEC such as Farmers may pay more per trunk than the typical BOC, there is no basis for assuming a 35-fold disparity in costs. Thus, Farmers' tariffed rate would greatly over-recover its trunk-side switching costs.

10. Based on the above, as Farmers's MOU volumes increased, it experienced no line-side cost increases, and only experienced trunk-side increases associated with the need for new trunk-side switch ports from the tandem switch to the end-office switch. These costs, as described above, were far below Farmers's tariffed interstate end-office switching rates.

**b. Farmers's Tandem Transport Costs Have Not Risen in Proportion to its Increased Traffic Volumes.**

11. Farmers's tandem transport costs are also very unlikely to have risen in proportion to its traffic volumes. This is true because the economics of trunk connections between tandem switches and end-office switches demonstrate increasing efficiencies with increasing usage. As traffic levels increase, carriers generally transition from using DS1-capacity facilities (which carry the equivalent of 24 voice-grade communication paths, also known as DS0 circuits), to DS3-capacity facilities (which in turn carry the equivalent of 28 DS1s, or 672 DS0s), to OCn facilities (which carry many times the capacity of a DS3 link). This progression up the capacity hierarchy entails efficiency gains and thus reduces per-MOU costs. In fact, once the carrier shifts to fiber-optic facilities (generally at the DS1 or DS3 level), increased traffic flows will hardly increase costs *at all*. This is because a fiber-optic cable's capacity is not inherently limited, but rather is governed by the electronics equipment used to "light" the fiber. Thus, depending on the electronics installed, the same fiber facility once configured to operate

at DS1 capacity can later be used to transmit at DS3 or OCn capacity with very few additional costs.[5]

12. Thus, Farmers's tandem transport costs did not rise at a pace comparable to the pace at which its traffic figures grew during the period relevant to Qwest's Complaint. Instead, as traffic figures increased, per-MOU costs declined, slowing the growth in costs as time went on.

13. In summary, there is no reason to believe that Farmers's costs increased in proportion to the growth in its traffic figures. The new traffic likely imposed no new line-side end-office switching costs, and only limited trunk-side switching costs that remained far below the local switching charges contemplated by Farmers's access tariff. While its increased traffic likely did increase its tandem transport costs, MOU growth would also have entailed increased scale efficiencies, ensuring that costs did not grow proportionally.

**c. Increased Usage Per Trunk Further Increases Economies of Scale For Both End-Office Switching and Tandem Transport Unit Costs.**

14. In addition to the economies of scale discussed above for end office switching and tandem transport, there are yet further efficiencies that occur with increased volume. In June of 2005, the total interstate traffic to and from Farmers could be carried on approximately 40 DS0 circuits. By the end of 2006, the DS0 circuits

[5] *See, e.g.*, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, 2616 ¶ 150 (2005) (subsequent history omitted) ("The most significant portion of the costs incurred in building a fiber loop results from deploying the physical fiber infrastructure into underground conduit to a particular location, rather than from lighting the fiber-optic cable. The record reflects that for these reasons, LECs do not typically construct fiber loop facilities at lower capacity levels, such as DS1 or DS3, but rather install high-capacity fiber-optic cables and then use electronics to light the fiber at specific capacity levels, often 'channelizing' these higher-capacity offerings into multiple lower-capacity streams.").

required number in the thousands. The average usage per circuit for 40 circuits is about 40 minutes per hour in the peak hour. This average per circuit increases to 54 peak hour minutes with the amount of interstate minutes Farmers was experiencing in December of 2006. This reflects a 35% increase in efficiency. This increased efficiency is a mathematical phenomenon explained by the "Poisson Traffic Model." This model is traditionally used in engineering telecommunications facilities to estimate the amount of traffic that can be offered over a given number of circuits in order not to exceed blocking of 1% (P.01) of the attempted calls during a one-hour period – usually the "peak" or "busy" hour. The Poisson Traffic Model reflects the fact that with calls being connected and disconnected throughout the peak hour, there cannot be a full 60 minutes of usage on the average trunk. However, the amount of usage per circuit increases as the total offered traffic increases. In short, even apart from the efficiencies discussed above, the per-MOU costs associated with end office trunk ports and transport to the tandem switch will decline as volumes increase on account of more efficient use of each trunk circuit.

## II. NECA's FCC-Approved Average Schedule Settlement Formulae Recognize that MOU Growth Alone Does Not Lead to Proportional Growth in a Carrier's Terminating Access Costs.

15. The scale-economy principles discussed above have been recognized by the Commission in its approval of the formulae used to calculate settlements for average-schedule companies in the National Exchange Carrier Association ("NECA") access-charge pool. As described more fully in Qwest's Complaint, these formulae are used to calculate the recovery due to average-schedule companies for their provision of access services. They are proposed annually by NECA, put out for comment, and ultimately

approved (with or without modification) by the Commission.[6] Thus, settlements produced using the NECA settlement formulae represent Commission-endorsed estimates of a small carrier's costs plus the authorized rate of return. Indeed, in the context of the small-carrier rule at issue in this Complaint, 47 U.S.C. § 61.39, the Commission permits some LECs to continue to rely on the settlement it would have received had it remained in the NECA pool as a proxy for its costs long after its exit from the pool. 47 C.F.R. § 61.39(b)(2).

16. Consistent with the analysis in Part I of this Declaration, the current NECA settlement formulae predict that Farmers's traffic volume increases have *not* produced a proportional increase in Farmers's costs. Indeed, those formulae predict that Farmers's costs have not even grown by 15 percent of the amount its volumes have grown. Put differently, while Farmers's monthly MOU figures – and therefore its access bills – increased by 238 times between June 2005 and December 2006, its costs, as predicted by the FCC-approved NECA settlement formula, have only increased by approximately 35 times.

17. The two most critical inputs to the NECA settlement formulae are the number of interstate access minutes transiting the network and the number of access lines used by the average-schedule carrier.

18. As described above, Farmers's line-count figures have not increased during the time period relevant to Qwest's complaint, and have in fact decreased modestly. For purposes of the present analysis, I am assuming that Farmers's line counts have remained constant during this period.

[6] *See* 47 C.F.R. § 69.606; *National Exchange Carrier Association, Inc. 2006 Modification of Average Schedules*, 21 FCC Rcd 6220 (WCB 2006).

19. In contrast, Farmers's traffic volumes have increased dramatically. As described more fully in the Declaration of Lisa Hensley Eckert, Qwest delivered (directly or indirectly) between 32,000 and 45,500 MOUs per month to Farmers for its retail and wholesale long-distance customers during the first half of calendar year 2005. In June of that year, Qwest delivered 42,413 MOUs to Farmers. Beginning the next month, traffic delivered by Qwest to Farmers began to rise rapidly – to 66,354 in July 2005, to 732,977 MOUs in August 2005, to 2,221,767 MOUs in August 2006, and to 10,099,944 MOUs, over *238* times the June 2005 figure, in December 2006. Hensley Eckert Decl. at ¶¶ 8-9; *id.* Ex. 1.

20. There is no reason to believe that trends affecting Qwest's Farmers-bound traffic would not apply with equal force to other IXCs' Farmers-bound traffic. Thus, the growth rate attributable to Qwest's Farmers-related traffic can be applied to Farmers's *total* traffic figures to show how those total traffic figures likely ballooned. According to Table 8.4 of Universal Service Monitoring Report in CC Docket No. 98-202, released Dec. 2006, 33,122,646 MOUs of interstate access traffic were originated or terminated on Farmers's network in 2005. According to the figures presented in Exhibit 1 of the Declaration of Lisa Hensley Eckert, 8,559,234 of those MOUs involved Qwest's network. Thus, Farmers's total interstate access MOUs are roughly four times those to or from Qwest's network (*i.e.*, 33,122,646 / 8,559,234).

21. Using this ratio, we can estimate that in June 2005 – the last month before Farmers left the NECA pool and before its volumes began to rise – about 169,652 MOUs (42,413 Qwest-related MOUs, times four) terminated on Farmers's network. In contrast, we can estimate that about 2,931,908 MOUs (732,977 Qwest-related MOUs, times four)

terminated on Farmers's network in August of 2005. Similarly, we can estimate that about 40,399,776 MOUs (10,099,944 Qwest-related MOUs, times four) terminated on Farmers's network in December of 2006.

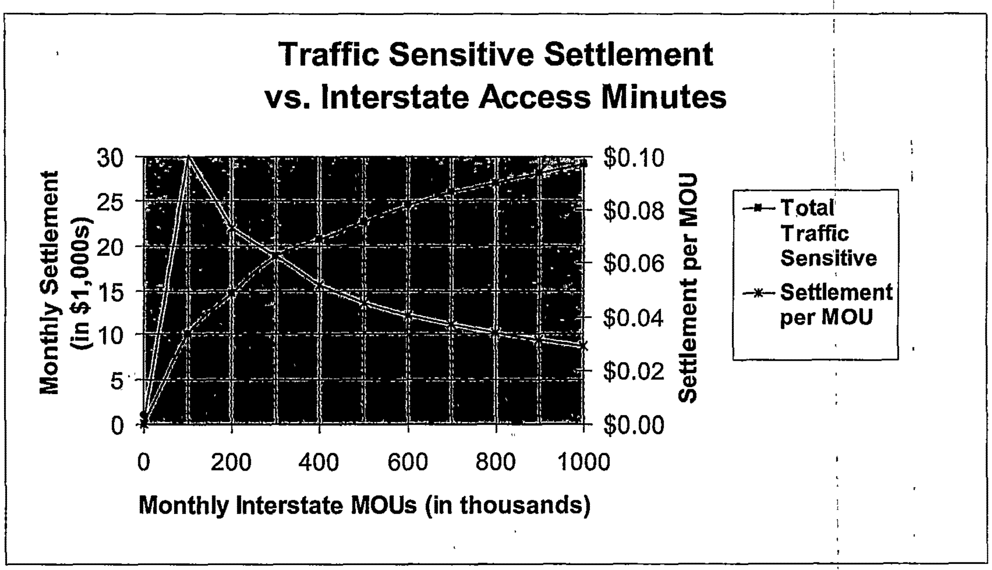
22. Application of these figures to the NECA settlement formulae are reflected in Table 1 below. This table reflects monthly NECA settlements given the traffic volumes derived above for specific months, holding access line counts constant. As Farmers's traffic volumes (and bills) increased, its costs increased at a much slower pace. In August 2005, its terminating access volume had grown by 1628% from its June 2005 volume, but its traffic-sensitive settlement would have grown by only 280% from its June 2005 settlement. In December 2006, its terminating access volume had grown by 23,713% of its June 2005 volume, but its traffic-sensitive settlement would have grown to $462,757, a 3,377% increase from June 2005. Thus, assuming Farmers applied its tariffed per-MOU interstate access rates throughout the period at issue, there would have been a huge disparity between the growth in its receipts between June 2005 and December 2006 and the (far smaller) growth its in costs during that period.

**TABLE 1**

| | June 2005 | Aug. 2005 | Dec. 2006 |
|---|---|---|---|
| **Interstate Terminating Minutes per Month** | 169,652 | 2,931,908 | 40,399,776 |
| **% Growth in Terminating Interstate MOUs from June 2005 MOUs** | N/A | 1628% | 23713% |
| **Total Traffic-Sensitive Settlement per Month** | $13,311 | $50,532 | $462,757 |
| **Percent Growth in Traffic-Sensitive Settlement from June 2005** | N/A | 280% | 3377% |
| **Total Traffic-Sensitive Settlement per Minute** | $0.078 | $0.017 | $0.011 |

23. Based on the average schedule formulae for traffic sensitive settlements for the time period at issue in this Complaint, the effect of increasing minutes of use given a fixed number of lines is to decrease the settlement per MOU. In other words, as traffic volume increases, the total settlement *per minute* decreases. This can be seen in the bottom row of Table 1. This, too, is shown graphically below in Chart 1. This chart compares total monthly MOUs against a carrier's total traffic-sensitive monthly settlement and its "settlement per minute" under the currently applicable settlement formulae.

**CHART 1** – Settlements Based on 2006-2007 Formulae




Notably, as indicated in this graph, at volumes above 100,000 MOUs per month, per-MOU costs (as represented by settlements) decline with each additional MOU. Thus, to the extent tariffed rates are based (as in Farmers's case) on usage figures that fall below actual usage, they are likely to over-recover the carrier's costs.

24. The NECA settlement formulae, approved by the Commission, reflect the principles discussed above: When a carrier such as Farmers experiences a substantial increase in access traffic volumes, but that increase is not accompanied by a similar rise in access line counts, its costs rise at a much slower pace than its receipts.

25. This concludes this Declaration.

I, Peter Copeland, declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Peter Copeland

Date: May 1, 2007

# Exhibit 68

## Excerpted Pages from the Deposition of Thomas Lovell (taken Oct. 29, 2009)

## HIGHLY CONFIDENTIAL MATERIALS OMITTED

# Exhibit 69

## Excerpted Pages from the Deposition of Dennis Creveling (taken Feb. 10, 2010)

## HIGHLY CONFIDENTIAL MATERIALS OMITTED

# Exhibit 70

## INS 2010 Income Statement Summary (Aureon_01537-41)

## HIGHLY CONFIDENTIAL MATERIALS OMITTED

# Exhibit 71

## INS 2012 Income Statement Summary (Aureon_01613-16)

## HIGHLY CONFIDENTIAL MATERIALS OMITTED

# Exhibit 72

## INS 2013 Income Statement Summary (Aureon_01939-42)

## HIGHLY CONFIDENTIAL MATERIALS OMITTED

# Exhibit 73

## INS Reply Comment, *In re Petition of AT&T Servs., Inc. for Forbearance*, WC Docket No. 16-363 (filed Dec. 19, 2016)

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

| | |
|---|---|
| In the Matter of<br><br>Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Rules for Switched Access Services and Toll Free Database Dip Charges | WC Docket No. 16-363 |

## IOWA NETWORK SERVICES, INC.'S REPLY COMMENTS

In response to comments filed by other parties, Iowa Network Services, Inc., d/b/a Aureon Network Services ("Aureon"), submits the following reply comments concerning the AT&T Services, Inc. ("AT&T") petition for forbearance filed in the above-captioned proceeding.[1]

On December 2, 2016, Aureon filed a motion for partial summary denial ("Motion"), requesting that the Commission exclude the tariffs of Centralized Equal Access ("CEA") providers like Aureon from the scope of the forbearance sought by AT&T of the tariffing requirements of the Communications Act of 1934 ("Act") and the FCC's rules. The majority of other parties agreed that AT&T's petition fails to satisfy the three part test in 47 U.S.C. § 160(a) required to grant a petition for forbearance. To avoid being repetitive, Aureon respectively requests that the Commission refer to Aureon's Motion for a more in depth analysis of the issues impacting CEA service.

[1] Petition of AT&T Services, Inc. for Forbearance under 47 U.S.C. § 160(c), WC Docket No. 16-363, September 30, 2016 ("AT&T Petition").

The purpose of these reply comments is limited to addressing only three issues raised by other parties:

(1) Aureon's CEA rate, which decreases as traffic volume increases, does not provide excess funds that Aureon can flow downstream to subtending local exchange carriers ("LECs"), as Verizon contends.

(2) The Commission should not impose any limit on the number of miles to which Aureon applies its interstate switched transport rate because that rate is non-distance sensitive and therefore the amount that Aureon bills for such transport does not increase with any increase in the distance a call is transported.

(3) The Commission should reject CenturyLink's proposal to apply the competitive local exchange carrier ("CLEC") rate benchmark to all tandem providers because the Commission has classified CEA providers as dominant carriers subject to Section 61.38,[2] and has never regulated CEA providers as CLECs subject to the CLEC rate benchmark rule.

## I. Calculated to Reflect Both Traffic Volume and Cost, the CEA Tariff Rate is a Just and Reasonable Rate That Does Not Result in Excess Revenue.

As NTCA points out in its comments, the AT&T Petition "attempts to short-circuit existing tariff review processes, which "provides a full opportunity for both the filing and disputing entities to respectively justify and dispute the tariff.[3] Aureon's CEA tariff rate is just and reasonable because it is calculated on the basis of the volume of traffic that is routed over the CEA network and the costs of providing CEA service. Section 61.38 of the Commission's rules requires Aureon to file traffic and cost studies to support its CEA tariff rate. As traffic volume

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[2] 47 C.F.R. § 61.38.

[3] Comments of NTCA - The Rural Broadband Association at 9, WC Docket No. 16-363, Dec. 2, 2016.

increases, Section 61.38 requires the CEA tariff rate to decrease; and as traffic volume declines, Section 61.38 requires the CEA tariff rate to increase. Aureon only knows that traffic volumes increase, it cannot identify what causes the increase or if the increase is due to one of the subtending companies' involvement in access stimulation. Therefore, the CEA tariff rate decrease already reflects any increase in traffic volume that may result from access stimulation. Verizon's attack on Aureon's CEA tariff rate is unjustified, and Verizon's allegation that CEA service produces extra money that Aureon can "flow downstream" to LECs is baseless and completely meritless.[4]

Verizon's claim that the CEA tariff rate is "very high" is based on an inappropriate comparison of two distinct rates that cannot practically be compared: the CEA tariff rate with CenturyLink's transport rate.[5] This amounts to a comparison of "apples to oranges." The CEA and CenturyLink rates are different and incomparable for several reasons.

The CEA tariff rate in Aureon's interstate tariff is referred to as the switched transport rate.[6] That single switched transport rate recovers the costs of both transport and tandem switching. CenturyLink's transport rate only recovers CenturyLink's transport costs because CenturyLink bills a separate tandem switching rate to recover its tandem switching costs. In order to make rural areas more attractive for small IXCs to serve, Aureon charges a non-distance sensitive switched transport rate that provides IXCs with access to the more than 2,700 mile CEA network. By contrast, as CenturyLink's transport rate varies with mileage, CenturyLink charges an IXC more to transport a call the much farther distances required to reach rural areas. Verizon's use of 10 miles in its ill-conceived rate comparison fails to recognize that CEA service

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[4] Comments of Verizon at 3, WC Docket No. 16-363, Dec. 2, 2016.

[5] *Id.*

[6] Iowa Network Access Division Tariff F.C.C. No. 1, Section 6.8.1(A), 12 Revised Page 145.

transports many calls 100 miles, not just 10 miles. The average distance between the CEA tandem and the points of interconnection with LECs is 101 miles. Applying NECA's tariff rates, which are more representative of the rural areas served by Aureon, demonstrates the reasonableness of Aureon's composite switched transport rate. For terminating a call 101 miles, a NECA member bills \$0.051648 per minute for a combination of tandem switched facility (101 miles times \$0.000433 per minute), tandem switched termination (\$0.002247 per minute), and tandem switching (\$0.005668 per minute).[7] By comparison, Aureon's tariff bills only \$0.00896 per minute, or less than one-fifth of the NECA amount, for terminating the same interstate call. Given these many distinguishing characteristics, the CEA rate cannot be suitably compared to CenturyLink's transport rate.

Neither the level of the CEA tariff rate nor the extra traffic volume provide Aureon with extra money to "flow downstream" to LECs, as Verizon contends.[8] Earnings from the current CEA tariff rate are far below the maximum rate of return authorized by the Commission. According to the most recent Section 61.38 traffic and cost studies, CEA service actual return on interstate investment of negative 343.36 percent during the year 2015.[9] For the projected twelve month period, July 1, 2016 to June 30, 2017, the current CEA tariff rate will result in a negative 171.69 percent rate of return.[10] Much of this under-earning is attributable to AT&T's refusal to pay the CEA tariff rates since September, 2013. Furthermore, Section 61.38 rate calculations

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7 National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5, Section 17.2.2, 10 Revised Page 17-10.2.1.2.

8 Aureon also is not a party to an access revenue sharing agreement with any LEC or any other entity. Aureon has rebutted any presumption that Aureon is involved in access stimulation by providing a sworn affidavit from an Aureon officer attesting that Aureon is not a party to any access revenue sharing agreement. Frank Hilton Aff. ¶ 12, June 8, 2015, attached to INS' Reply to AT&T's Opposition to Motion for Summary Judgment on Tariff Claims, *Iowa Network Services, Inc. v. AT&T Corp.*, No. 14-3439 (D. N.J. June 8, 2015), ECF 32 ("INS is not a party to an access revenue sharing agreement").

9 Iowa Network Access Division Tariff F.C.C. No. 1, July 1, 2016 Annual Access Charge Tariff Filing, Description and Justification at 2, June 16, 2016.

10 *Id.*

requires Aureon to decrease the CEA tariff rate when demand increases and costs remain the same., which results in less money, not more. Verizon's contention that the CEA tariff rate is producing excess revenue is contrary to the facts and utterly false.

## II. Imposing a Mileage Limitation Upon CEA Service with a Non-Distance Sensitive Transport Rate Would Harm Long Distance Service Competition in Rural Areas.

Some of the comments filed by other parties appear to imply that the Commission should restrict the number of miles that can be billed for transport to one mile. Such a restriction is unwarranted for Aureon's non-distance sensitive switched transport rate, which results in the same charge whether a call is transported one mile or 100 miles. Furthermore, limiting the number of miles for CEA service would deny IXCs and their customers a primary benefit of CEA, which allows payment of a non-distance transport rate to route calls over a more than 2,700 mile network. Long distance service competition in rural areas has significantly benefitted as a consequence of a non-distance sensitive rate for CEA service. Rural consumers are no longer disadvantaged with less service choice and become attractive customers when IXCs do not have to pay more on a per mile basis to transport their calls to rural areas. The Commission should not undermine these benefits by imposing a mileage limitation on CEA service.

Limitations on mileage also provide the wrong incentives when analyzing technology migration and switch collapse. As LECs collapse multiple switches into a single switch the mileage for some locations will increase while others decrease. Putting a limit on the mileage could send the wrong incentives to LECs.

Limitations on mileage also discriminate against rural carriers that are further away. As mentioned above, Verizon uses a 10 mile example which might be the average transport for urban networks but the average mileage for the Aureon Network is over 100 miles to the point of interconnection with the subtending rural LEC. The rural LECs have additional mileage from the POI to their end office.

## III. As Dominant Carriers, CEA Providers Calculate Their Tariff Rates on the Basis of Traffic and Cost Studies Required by Section 61.38 Rather Than the Section 61.26 CLEC Rate Benchmark.

While asking the Commission to deny the AT&T Petition, CenturyLink's opposition/comments propose that the Commission "simply clarify that all tandem provider rates are subject to the CLEC benchmark rule."[11] The specific rule for which CenturyLink seeks clarification is Section 61.26, which is the CLEC benchmark rule that prohibits a CLEC from billing an access tariff rate that is higher than the tariff rate of the incumbent local exchange carrier ("ILEC") serving the same geographic area.[12] In determining the rate regulations applicable to CEA providers, the Commission should give effect to the overall regulatory scheme, which applies different rate regulations depending upon whether the Commission has classified a carrier as dominant or non-dominant.[13] *Richman Bros. Records, Inc. v. U.S. Sprint Communications Co.*, 953 F.2d 1431, 1436 (3rd Cir. 1991) (recognizing that the Commission "divided common carriers into two groups: dominant and non-dominant"). The Commission's rate regulations for dominant carriers like Aureon are contained in a separate subpart of the

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[11] CenturyLink Opposition/Comments to AT&T Forbearance Petition at 2, WC Docket No. 16-363, Dec. 30, 2016 ("CenturyLink Opposition/Comments"). As for CenturyLink's direct interconnection proposal, Aureon refers the Commission to Aureon's Motion, which provides a detailed discussion of why the public interest would be severely harmed by permitting large IXCs, such as CenturyLink, to remove large volumes of traffic from the CEA network. Motion at ii-iii, 9-10, 16, 19. It is important to note that CenturyLink is the successor to Northwestern Bell Telephone Company ("NWB"), which was the intraLATA toll monopolist that fiercely opposed the Commission's approval of Aureon's CEA network because NWB, unlike new long distance entrants, already had direct interconnection to the rural Iowa LECs and did not need use of the CEA common trunks.

[12] 47 C.F.R. § 61.26; CenturyLink Opposition/Comments at n. 7.

[13] *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into a harmonious whole'" (citations omitted). Such cannons of statutory construction apply when interpreting the Commission's rules. *Harris v. Norfolk Southern Railway Corp.,* 784 F.3d 954, 962 (4th Cir. 2015).

Commission's rules from the subpart containing the rate regulations for non-dominant carriers and the CLEC rate benchmark rule. Compare Sections 61.38, which is contained in the subpart entitled "General Rules for Dominant Carriers," to Section 61.26, which is contained in the subpart entitled "General Rules for Nondominant Carriers."[14] The CLEC rate benchmark in Section 61.26, which only applies to non-dominant carriers, cannot rationally be clarified to apply to CEA providers, which are dominant carriers. Therefore, the Commission should deny CenturyLink's request to the extent it seeks to subject dominant CEA carriers to the non-dominant carrier regulations in Section 61.26.

It is the rate regulations in Section 61.38 that apply to a dominant carrier service like CEA, not Section 61.26. Section 61.38 applies to Aureon because Aureon is a dominant carrier "whose gross annual revenues exceed $500,000 for the most recent 12 month period of operations." In granting certification under 47 U.S.C. § 214 for the operation of a CEA network, the Commission determined that "INAD is a dominant carrier providing exchange access services subject to Title II regulations and application requirements of Section 63.01."[15] While the Commission has classified ILECs and CLECs as non-dominant due to the rate caps adopted for those carriers, the Commission recently affirmed that "non-dominant status does not extend to centralized equal access providers because such carriers do not provide service to end users."[16] The rate caps were the sole reason the Commission reclassified ILECs as non-dominant.

> We also decline to engage in a more rigorous examination of traditional market power factors...We make no such assessment today. Rather, we find that the Commission's

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[14] Inspecting the titles of regulations is a well-accepting method of interpretation. *First Bank and Trust Co. of Princeton, Ky. v. Feuquay*, 405 F.2d 990, 993 (6th Cir. 1969).

[15] *Application of Iowa Network Access Division for Authority Pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's Rules and Regulations to Lease Transmission Facilities to Provide Access Service to Interexchange Carriers in the State of Iowa*, Memorandum Opinion, Order and Certificate, 3 FCC Rcd 1468, 1470 ¶ 10 (1988).

[16] *Technology Transitions,* Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 8283, 8290 n. 43 (rel. July 15, 2016).

> intercarrier compensation reforms have restructured the market for interstate switched access services in a manner that divests incumbent LECs of market power over these services."[17]

Had the Commission intended to apply the CLEC rate benchmark or ILEC rate caps to CEA providers, the Commission would have also reclassified CEA providers as non-dominant, which the Commission clearly did not do.

The Commission should also construe the scope of the CLEC rate benchmark in light of the Commission's long-standing historical practice of regulating CEA providers differently than CLECs.[18] For more than 15 years, the Commission has applied a benchmarking rule that permits CLECs to charge interstate access tariff rates at a level no higher than the tariff rate of the ILEC serving the same geographic area.[19] During the many years that the benchmarking rule has applied to CLECs, it has not applied to Aureon, which has consistently utilized cost and traffic data to set and revise its CEA tariff rates in accordance with Section 61.38. Unlike the cost support that the Commission has always required of CEA providers, since their inception nearly 30 years ago, the Commission "specifically disclaimed reliance on cost to set competitive LEC access rates." *In re Access Charge Reform; PrairieWave Telecomms.*, 23 FCC Rcd. 2556, 2560 ¶ 13 (2008). The historical inapplicability of the CLEC benchmark to Aureon invalidates using that benchmark rule to calculate CEA tariff rates.

### A. The CLEC Rate Benchmark Rule Should not be Applied to CEA Tariff Rates Because CEA Service Lacks End Users that Could Be Charged Higher Rates to Avoid the Serious Shortfall in Cost Recovery that Would Result.

The CLEC rate benchmark rule should also not be applied to CEA tariff rates due to the context in which that rule was adopted and the consequences of applying the CLEC rate

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17 *Id.* at ¶ 32.

18 *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (rejecting "formulastic reasoning that ignores…history").

19 *Access Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9925 ¶ 3 (rel. Apr. 26, 2001).

benchmark to CEA providers. The Commission's adoption of the CLEC rate benchmark presupposed that a CLEC could offset the reduction in revenue from IXCs by increasing rates charged end users. "Competitive LECs are free to recover reduced revenues through end-user charges." *Connect America Fund*, 26 FCC Rcd 17663, 17957 ¶ 850 (2011) ("*USF/ICC Transformation Order*"). "Competitive LECs…may recover reduced intercarrier revenues through end-user charges." *Id.* at 17961 ¶ 852. However, CEA providers do not provide CEA service to end users from whom they could recover reduced intercarrier revenue through an increase in end user charges. CEA service also does not receive money from either the Connect America Fund or the Universal Service Fund that could lessen the resulting shortfall in cost recovery. Given the absence of any other cost recovery mechanism, imposing the CLEC rate benchmark upon CEA service would threaten the financial viability of the CEA network and put in jeopardy the greater consumer choice of long distance services and advanced technologies that CEA has made available in rural Iowa. To ensure an operational CEA network that sustains the traffic concentration, which converted rural Iowa into an attractive market for smaller IXCs, the Commission should not apply the CLEC rate benchmark rule to CEA service.

**IV. These Issues should be addressed in an open rule making.**

Aureon supports other commenter's positions[20] that access stimulation and changes to intercarrier compensation rules be address in an open rule making. An FCC rule making allows the broader intercarrier compensation and policy issues to be more fully and effectively addressed.

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[20] NTCA page 7 #1 "Issue is Under Consideration in a Comprehensive and Pending Rulemaking Proceeding"; Nebraska Rural Independent Companies: "forbearance petitions cannot be used to circumvent the notice and comment rulemaking procedures…"; South Dakota Network, LLC: "there are actions that the Commission can take to directly address the alleged harmful actions of LECs engaged in access stimulation."; WTA and ERTA: "Such relief (as well as AT&T's request for rules to define the network 'edge' requires a full-fledged rulemaking open to all interested parties that will elicit detailed evidence and carefully consider intercarrier compensation, universal service and related issues that affect major portions of the telecommunications industry."

## V. Conclusion.

The Commission should reject CenturyLink's proposal to the extent it suggests that the CLEC benchmark rule should be imposed upon CEA providers like Aureon. CEA providers are not CLECs, but have been classified by the Commission as dominant carriers. The Commission has always regulated CEA providers under Section 61.38, not the rate regulations applicable to CLECs. Moreover, CEA service lacks end users that could be charged higher rates to avoid the serious shortfall in cost recovery that would result if CEA tariff rates were arbitrarily capped.

Access stimulation issues and changes to intercarrier compensation should be addressed in a rule making proceeding where such important issues, so significantly affecting the entire industry, can be more fully considered. For CEA service in particular, continued enforcement of the CEA tariffs is critical to preventing AT&T from shifting network costs to smaller IXCs and preserving consumer choice in the long distance market in rural Iowa. Section 61.38 ensures the same just and reasonable CEA tariff rate for all IXCs, both large and small, is based on the traffic that all IXCs route over the CEA network and the costs of providing CEA service. Section 61.38 also prevents any excess revenue from access stimulation because as traffic volume increases, the CEA tariff rate decreases. Furthermore, a mileage limitation for CEA service is completely unwarranted because Aureon bills a non-distance sensitive transport rate for CEA service which allows IXCs to have their calls transported a longer distance without paying more on a per mile basis. Rural competition and consumer choice has thrived as a consequence.

For the reasons set forth in Aureon's Motion for Partial Summary Denial, the Commission should deny the AT&T Petition with respect to CEA service. By excluding CEA from the scope of any forbearance, the Commission will allow the CEA tariffs to remain a strong defense against schemes that will lessen competition and the choice of telecommunication services available in rural Iowa.

Respectfully submitted,

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Counsel for Iowa Network Services, Inc.
d/b/a Aureon Network Services

Date: December 19, 2016

# Exhibit 74

## INS Worksheets
## (Aureon_01934-38)

## HIGHLY CONFIDENTIAL MATERIALS OMITTED

# Exhibit 75

## INS Worksheets (Aureon_02180-85)

## HIGHLY CONFIDENTIAL MATERIALS OMITTED

# Exhibit 76

## INS Worksheets (Aureon_02394-99)

## HIGHLY CONFIDENTIAL MATERIALS OMITTED

# Exhibit 77

## Direct Connection Cost Analysis (prepared Aug. 15, 2016)

## HIGHLY CONFIDENTIAL MATERIALS OMITTED

# Exhibit 78

**Email from Jack Habiak
to Jon Hedgecock
(ATT-000740)
(dated Nov. 8, 2013)**

**CONFIDENTIAL
MATERIALS OMITTED**

# Exhibit 79

## Email from Jack Habiak to Dennis Creveling (ATT-000754) (dated Feb. 28, 2014)

## CONFIDENTIAL MATERIALS OMITTED

# Exhibit 80

## AT&T Billing Summary (ATT-000999)

## HIGHLY CONFIDENTIAL MATERIALS OMITTED

# Exhibit 81

## INS Operating Expense Summary (2016) (Aureon_02468-02581)

## HIGHLY CONFIDENTIAL MATERIALS OMITTED

# Exhibit 82

## C.V. of Daniel Rhinehart

# DANIEL RHINEHART

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Proficient in performing and directing performance of cost analysis, regulatory functions and regulatory litigation.

- Financial and product cost analyst with expertise in fundamentals of accounting, auditing, embedded and incremental costs, cost allocations, margin analysis, capital costs, and depreciation.
- Regulatory manager experienced in interpreting statutes and regulations; and drafting, advocating, and ensuring compliance with agency regulations.
- Litigation support manager skilled in discovery, developing and delivering cost and policy testimony, preparing work papers and post-hearing briefs.

## PROFESSIONAL EXPERIENCE

**AT&T Services Inc. and Predecessors**

**Director – Regulatory, National Regulatory Organization** **2015 - Present**

Director providing pole attachment rate development, cost analysis and regulatory advocacy supporting company strategic initiatives.

**Director – Financial Analysis, ATTCost/Capital Planning Division** **2012 - 2015**

Director providing product cost analysis support and regulatory advocacy supporting company strategic initiatives.

**Lead Financial Analyst, Finance Costing Division** **2006 - 2012**

Senior analyst and regulatory advocate supporting company negotiations, arbitrations and regulatory policy.

**Senior Specialist, Global Access Management** **2005 - 2006**

Senior analyst and regulatory advocate supporting company negotiations, arbitrations and regulatory policy.

**Professional, Law and Government Affairs, National Cost Team** **2001 - 2004**

Senior cost analyst and national regulatory advocate auditing supplier costs and clearly presenting company positions to regulators.

**District Manager, State Government Affairs** **1995 - 2001**

Senior regional regulatory advocate and cost analyst responsible for developing and implementing company policy in five states.

**Manager, State Government Affairs, Exchange Carrier Cost Analysis** **1985 - 1995**

Cost analyst and regulatory advocate responsible for developing regulatory policy toward local telephone companies in California.

**Supervisor** **1984 - 1985**

Separations and Settlements analyst for company regulated costs.

## EDUCATION

MBA, St. Mary's College, Moraga, CA, with honors.

BS – Education, University of Nevada – Reno, Math Major, with High Distinction

## PROFESSIONAL DEVELOPMENT

The Brookings Institution–Understanding Federal Government Operations

University of Southern California–Middle Management Program in Telecommunications

**PREVIOUS TESTIMONY OF DANIEL P. RHINEHART**

| Date Filed | State | Proceeding Number | Subjects Addressed |
|---|---|---|---|
| 3/17 | Kentucky | 2016-00370<br>2016-00371 | Pole Attachment Rates |
| 11/16<br>1/17 | Illinois | 16-0378 | Illinois USF – IITA/AT&T Stipulation |
| 12/15<br>4/16 | South Dakota | 1:14-cv-01018 | Northern Valley Communications v. AT&T Corp. – Traffic Pumping |
| 10/15 | Arkansas | 150019-R | Pole Attachment Rates, terms and conditions. [Panel testimony sponsoring Joint Parties Comments] |
| 6/15 | California | Truckee Donner PUD | Pole Attachment Rates |
| 3/14 | Maine | 2013-00340 | FairPoint Maine USF Request – Revenue, Rate Base, Rate of Return, Expenses, FLEC Model. |
| 10/13 | Nevada | 13-060007 | Rio Virgin Telephone Rate Case – Access Rates and Cost Allocations |
| 2/13 | Alaska | U-12-120 et al | Switched Access Demand |
| 12/12<br>2/13 | Oklahoma | PUD 201200040 | Oklahoma High Cost Fund |
| 7/12 | Georgia | 35068 | Rate Cases for [UAF Year 16] Track 2 Applicants – Public Service Telephone. |
| 1/12 | Oklahoma | PUD 201000211<br>PUD 201100145 | Settlement Agreement related to state High Cost Fund and State Universal Service Fund |
| 11/11 | Nebraska | FC-1332, FC-1335 | OrbitCom Access Service Rates |
| 10/11 | Iowa | FCU-2011-0002 | Aventure Communications Cost of High Volume Access (HVAS) Traffic |
| 8/11 | Georgia | 32235 | Ringgold - Track 2 UAF Revenue Requirement |
| 8/11 | Georgia | 32235 | Public Service - Track 2 UAF Revenue Requirement |
| 8/11 | Georgia | 32235 | Chickamauga - Track 2 UAF Revenue Requirement |
| 3/11<br>5/11 | Georgia | 32235 | Universal Access Fund cost of capital and caps on UAF distributions. |
| 7/10<br>3/11 | Texas | PUC Docket No. 36633<br>SOAH No.473-09-5470 | Pole attachment rates, cost of capital. |
| 12/09 | Alaska | U-09-081, U-09-082, U-09-083, U-09-084, U-09-085, U-09-086, U-09-087, U-09-088 [Unconsolidated] | Switched access revenue requirements for various companies. Addressed variously non-regulated cost assignments, depreciation expense, corporate operations expenses, and other disallowances. |
| 6/09<br>8/09 | Iowa | TF-2009-0030 | Switched Access cost study for Kalona Cooperative Telephone Company |
| 2/09 | Alaska | U-08-081 | Switched Access Demand for pooled access rates |
| 12/08 | Alaska | U-08-084, U-08-086, U-08-087, U-08-088, U-08-089, U- | Switched access revenue requirements for various companies. Included variously, depreciation expense, |

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|---|---|---|---|
| | | 08-090, U-08-112, U-08-113 [Unconsolidated] | corporate operations expense, and cost of capital. |
| 11/08 | Nebraska | Application C-3745/ NUSF-60.02/PI-138 | Switched Access Rates and Cost of Capital |
| 2/08<br>3/08 | Oklahoma | Cause No. PUD 200700370 | Medicine Park Tel. Co. request for Oklahoma USF Support |
| 6/07<br>7/07 | Iowa | Docket RPU-07-1 | South Slope Coop – Separations Cost Study and CCL Rate |
| 4/07<br>10/07 | Texas | Docket 33545 | McLeodUSA Access Cost Model – Cost of Capital, Asset Lives, Factors, Common Costs, Rate Development |
| 3/07 | Oklahoma | Cause No. PUD 200600374 | Medicine Park Tel. Co. separations study supporting request for High Cost Funds |
| 6/05<br>7/05 | Missouri | Case No. TT-2002-129 | AT&T Instate Connection Fee |
| 5/05 | Missouri | Case No. TO-2005-0336 | UNE Policy Issues (dedicated transport, combinations/commingling, EELs, ILEC obligations, etc.), UNE Rider, Pricing |
| 3/05<br>4/05 | Texas | Docket 28821 | UNE Policy (dedicated transport, combinations and commingling, EELs, ILEC obligations, etc.) |
| 2/05<br>3/05 | Kansas | Docket 05-AT&T-366-ARB | Call Flows, UNE Policy Issues |
| 1/05<br>2/05<br>3/05 | Oklahoma | Cause No. PUD 200400493 | Interim contract pricing terms (1/05), call flows and permanent pricing (2/05), UNE Issues and pricing (3/05) |
| 3/04 | Oklahoma | Cause No. PUD 200300646 | Track I Triennial Review Impairment Analysis (Sponsored with Robert Flappan) |
| 12/03<br>1/04 | Texas | Docket No. 28600 | Asset Lives, Capital Cost Factors, Annual Cost Factors, Shared and Common Costs |
| 5/03<br>6/03 | Illinois | Docket No. 03-0329 | Reciprocal compensation, 8YY compensation, space license |
| 11/02<br>2/03 | Texas | Docket 25834 | Depreciation, Annual Cost Factors, Investment Factors, Inflation and Productivity, Common Costs |
| 10/01 | Missouri | Case No. TO-2001-438 | Depreciation, Cost Factors, Labor Rates, Common Costs |
| 4/01 | Missouri | Case No. TO-2001-455 | AT&T Interconnection Agreement Arbitration – Intellectual Property, Stand-alone Services Resale, Audit Rights, UNE Costs |
| 2/01 | Kansas | Docket 99-GIMT-326-GIT | Universal Service Fund Portability (Sponsored at hearing by R. Flappan) |
| 12/00 | Oklahoma | Cause No. PUD 2000000587 | Intellectual Property, Reciprocal Compensation for ISP-bound traffic, Vertical Services Resale, Access to OSS and CPNI, OSS Audit, Definitions |
| 8/00 | Kansas | Docket 00-GIMT-1054-GIT | Reciprocal Compensation for ISP-bound traffic |
| 6/00 | Texas | PUC Docket 22315 | Intellectual Property and Access to Operational Support Systems |

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|---|---|---|---|
| 5/00 | Texas | PUC Docket 21425<br>SOAH No. 473-99-2071 | Resale obligations under FTA for vertical features, Local Plus and LDMTS service offers |
| 3/00 | Texas | Docket 21982 | SWBT Cost Study for Internet-Bound Traffic |
| 1/00 | FCC | Docket 00-4 | SWBT Long Distance Entry in Texas, Glue Charges and Intellectual Property |
| 1/00 | Kansas | Docket 97-SCCC-149-GIT | Resale Discount Levels |
| 1/00 | Missouri | Docket TT-2000-258 | Local Plus Resale Issues |
| 12/99 | Texas | Docket 20047 | GTE Directory Assistance Listing Information Service |
| 11/99 | Kansas | Docket 99-GIMT-326-GIT | Kansas Universal Service Fund Issues (Sharing of USF Support) |
| 10/99 | Texas | Docket 21392 | SWBT Switched Access Optional Payment Plan |
| 10/99 | Texas | Project 18515 | Texas USF Further Implementation Issues |
| 6/99<br>7/99 | Texas | Project 18515<br>Project 18516 | Texas USF Implementation Issues |
| 4/99<br>5/99 | Kansas | Docket 99-GIMT-326-GIT | Kansas Universal Service Fund Issues |
| 4/99<br>5/99<br>6/99 | Missouri | Case No. TO-98-329 | Missouri Universal Service Fund Issues |
| 12/98 | Texas | Project 16251 | Right-to-Use Adder costs |
| 10/98 | Texas | Project 18516 | Texas Universal Service Fund Issues for Small LECs |
| 9/98 | Missouri | Docket TO-98-115 | Arbitration Cost Studies of SWBT (Sponsored at hearing by D. Crombie) |
| 6/98<br>7/98<br>8/98 | Kansas | Docket 97-SCCC-149-GIT | Generic Cost Docket for SWBT. Depreciation, cost factors, fill factors. |
| 4/98 | Texas | Docket 16251 | Non-cost basis of certain Arbitration rates for SWBT – TX |
| 1/98 | Oklahoma | Cause No. PUD 970000442 | Permanent Rates for SWBT Services |
| 1/98 | Oklahoma | Cause No. PUD 970000213 | Permanent Rates for SWBT Unbundled Network Elements |
| 8/97 | Texas | Docket No. 16226 | Restatement of SWBT Arbitration Cost Studies |
| 3/97 | Kansas | Docket 97 SCCC 149-GIT | Generic Cost Proceeding for SWBT |
| 1/97 | Arkansas | Docket No. 96-395-U | Arbitration Cost Studies of SWBT – AR |
| 1/97 | Kansas | Docket 97-AT&T-290-ARB | Arbitration Cost Studies of SWBT – KS |
| 10/96 | Texas | Docket 16300 | Arbitration Cost Studies of GTE – TX |
| 10/96 | Missouri | Case No. TO-97-63 | Arbitration Cost Studies of GTE – MO |
| 10/96 | Oklahoma | Cause 960000242 | Arbitration Cost Studies of GTE – OK |
| 10/96 | Missouri | Case No. TO-97-40 | Arbitration Cost Studies of SWBT – MO |
| 9/96 | Oklahoma | Cause No. PUD 960000218 | Arbitration Cost Studies of SWBT – OK |
| 9/96 | Texas | Docket 16226 | Arbitration Cost Studies of SWBT – TX |
| 6/96<br>7/96 | Kansas | 190,492-U | Universal Service Fund, Alternative Regulation, Imputation |
| 1/96 | Texas | Docket 14659 | Costs of SWBT and GTE loop facilities |
| 1/96 | Texas | Docket 14658 | Resale of SWBT and GTE services under PURA |

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|---|---|---|---|
| 9/95 | California | A.95-02-011<br>A.95-05-018 | Uniform System of Accounts Rewrite rate adjustments |
| 6/95 | Missouri | Case TR-95-241 | SWBT Local Plus service offering |
| 8/94<br>2/95 | California | A.93-12-005<br>I.94-02-020 | Citizens Utilities General Rate Case, Access Pricing, Price Cap, IntraLATA Equal Access, Imputation |
| 4/93 | California | A.92-05-002<br>A.92-05-004<br>I.87-11-033 | First Price Cap Review, productivity factors, sharing |
| 6/92 | California | I.87-11-033 | Centrex and PBX trunk Pricing |
| 10/91 | California | I.87-11-033 | Competitive entry issues |
| 1/91 | California | A.85-01-034 | High Cost Funding |
| 10/90 | California | I.87-11-033 | Expansion of Local Calling Areas, Touch Tone |